Supreme Court of the United States.

THE UNITED STATES, on the relation of Mark Howard, *et als.* *vs.* THE JUDGES OF THE CIRCUIT COURT of the United States for the district of Iowa, respondents.	Original suit No. 12.

Return of the respondents to the alternative writ of mandamus in the above entitled cause.

The undersigned, the judges of the circuit court of the United States for the district of Iowa, for return to the alternative writ of mandamus heretofore issued by said Supreme Court of the United States against them, on the application of Mark Howard, *et als.*, respectfully say, that it is true, as stated in the petition for an alternative writ of mandamus filed by said relators in this cause, (which petition or any equivalent statement of facts is not incorporated in the alternative writ which was issued and served upon these respondents,) that on the 9th day of July, A. D. 1866, Mark Howard and John Weber, two of the relators, commenced a suit in equity, in the circuit court of the United States for the district of Iowa, against the city of Davenport, the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, and the Chicago, Rock Island Pacific Railroad Company, to enforce the payment of divers judgments which the said Howard and Weber had severally recovered against the city of Davenport, and also against the Mississippi and Mis-

souri Railroad Company, which judgments were founded upon bonds issued by the city of Davenport to aid the construction of the Mississippi and Missouri railroad, and were guarantied by the said railroad company.

These respondents also admit it to be true, as stated in said petition, that during the progress of that suit divers other parties, to wit, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey D. Tracey, Harriet Le Conte, Joseph Clark, Volkert P. Dow, Margaret S. Nesbit, and Jared F. Harrison, holders of divers bonds issued by sundry other cities and counties in the State of Iowa to said Mississippi and Missouri Railroad Company, were allowed by the circuit court of said district of Iowa, to become parties to that suit, and join with said Howard and Weber in the prosecution of it, and to share in the fruits of the litigation, as their interests and rights should appear.

And these respondents admit, that in the bill filed by said Howard and Weber, the complainants made in substance the statements and allegations which are set out on pages 2 and 3 of the petition in this cause, as follows:

That at a meeting of the stock and bondholders of the Mississippi and Missouri Railroad Company, held in New York, on the 20th of October, 1865, it was resolved to sell the Mississippi and Missouri railroad, its franchises, and all its real and personal property, to the Chicago and Rock Island Railroad Company, for the sum of $5,500,000, provided the same was distributed among the mortgage bondholders and stockholders of said Mississippi and Missouri Railroad Company, according to the following scale:

First mortgage, eastern division, par and interest to 1st July, 1865,		$1,256,490
Second mortgage, " "	$400,000 at 80	320,000
Oskaloosa division	665,439 at 62½	416,212
Land grant division bonds	3,878,550 at 70	2,710,635
Second construction mortgage bonds	693,764 at 30	208,129
Capital stock	3,452,500 at 16	552,400
Expenses foreclosure		32,194
		$5,500,000

And George W. Stanton, jr., John Elliott, and Blakely Wilson were appointed a committee or trustees, for the stock

and bondholders, to arrange the terms and manner of sale, and select some trust company to receive the bonds and stock of the assenting parties, and give them certificates of what they were entitled to receive. That on the 1st of November, 1865, the said Mississippi and Missouri Railroad Company, and the Chicago and Rock Island Railroad Company, entered into a contract in writing to carry out the sale of the former company's road, according to the resolutions of the 20th of October, 1865, to the Chicago and Rock Island Railroad Company; by which agreement the Mississippi and Missouri Railroad corporation were to cause the outstanding mortgages on its property to be foreclosed, and the said property to be sold under the foreclosure decree, so as to convey a clear title to such corporation in Iowa as the Chicago and Rock Island Railroad Company might designate, and the five and a half millions purchase money were to be paid in bonds of said company, guarantied by the Chicago and Rock Island Railroad Company, or a consolidated company made of the two. That the mortgages were foreclosed and a decree rendered in May, 1866, and the whole property was sold, under said decree, in separate parcels, on July 9, 1866, to the Chicago, Rock Island, and Pacific Railroad Company, for sums amounting in the aggregate to $2,100,000, and said company was consolidated with the Chicago and Rock Island railroad, and proceeded to execute said contract of 1st November, 1865. The plaintiffs, Howard *et als.*, claimed that the said Mississippi and Missouri Railroad Company were insolvent, and before the sum of $552,000, set apart by the terms of the sale, could be divided among the stockholders, it should be divided among them, Howard and others, as holders of the said guarantied bonds and judgments thereon. The said Mississippi and Missouri Railroad Company, and the trustees of stock and bondholders, who assented to said sale, Stanton, Elliott, and Wilson, the Chicago and Rock Island railroad, and the Chicago, Rock Island and Pacific railroad, the new company created in Iowa, and consolidated with the Chicago and Rock Island railroad, were made parties defendant. The trustees, Stanton, Elliott, and Wilson, answered and made defence. The Chicago, Rock Island and Pacific Railroad Company answered, alleging that they had become agents to distribute the fund, and made no defence, and demanded to be protected by the decree of the court.

These respondents, for greater certainty, and to correct some clerical errors in the said petition, crave leave to refer

to the copy of the bill of complaint filed by said Howard and Weber, which appears on pages 2 to 7 inclusive, of the transcript of the record of the case of John V. McCollum *et als.*, appellants, *vs.* Mark Howard *et al.*, appellees, in case No. 344, on the docket of this court for the present term, as a part of this return; and they also make the whole of said transcript of record in said case, No. 344, a part of this their return, marked exhibit "A," and they will hereinafter refer to the same as the transcript of the record in case No. 344.

The respondents also admit it to be true, as stated in said petition, that at the May term, A. D. 1868, of the said circuit court, a decree was entered in said cause for a distribution *pro rata* among the several claimants and intervenors in said cause, whose claims amounted to about the sum of $802,032 38; of the funds then in the hands of the receiver appointed by said circuit court in said cause, and which amounted to about the sum of $552,320; but for greater certainty these respondents crave leave to refer to the full transcript or copy of said decree, which appears in said transcript No. 344, on pages 109 to 114, as a part of this their return.

These respondents, further answering, admit that the defendants in said suit prosecuted an appeal from said decree to this court, and that at the December term, A. D. 1868, of this court, the said decree of the circuit court of the district of Iowa was affirmed, and a mandate was issued from this court to said circuit court, but not, as is erroneously stated in said petition, "commanding the said court to execute said decree so affirmed," but in the words and figures following:

On this day, to wit, the eleventh day of May, A. D. 1869, came the plaintiffs, by Grant, their solicitor, and filed in said cause, in said clerk's office, the mandate of the Supreme Court of the United States, which mandate is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit of the United States for the district of Iowa, greeting:

Whereas lately, in the circuit court of the United States for the district of Iowa, before you, or some of you, in a cause

between Mark Howard and John Weber, complainants, and Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Margaret J. Nesbit, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, and Jared F. Harrison, intervening claimants joining in the bill, and the city of Davenport, the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, the city of Muscatine, the city of Iowa City, and the county of Scott, defendants, wherein the decree of the said circuit court entered in said cause is in the following words, to wit:

(Here follows a full and correct copy of the final decree in this cause, a full, true, and correct copy of which appears herein, commencing at folio 777 of this transcript.)

As by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appear.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-eight, the said cause came on to be heard before said Supreme Court on said transcript, and was argued by counsel, on consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the said complainants recover against the said defendants the city of Davenport *et al.*, for their costs herein expended and have execution therefor. 8 February, 1869.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as, according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Salmon P. Chase, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-eight.

Costs of complainants: clerk, $; attorney, $, paid by defendants. Taxed by

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Endorsed: Filed May 11, 1869.

GEORGE B. CORKHILL,
Clerk.

As by reference to a copy of said mandate in said transcript, No. 344, pages 256, 257, will more fully appear.

These respondents, further answering, say, that after the appeal was taken by the defendants in said suit of Howard *et als.*, from the decree of the circuit court of the district of Iowa to this court, to wit, on the 27th day of October, A. D. 1868, one Frederick A. Foster filed a petition in said circuit court, entitled, in said cause of Mark Howard *et al.*, *vs.* The Mississippi and Missouri River Railroad Company, *et al.*, in substance as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES—DISTRICT OF IOWA.

MARK HOWARD *et al.*,
vs.
THE MISSISSIPPI and MISSOURI RIVER RAILROAD COMPANY *et al.*

To the honorable the judges of the circuit court of the United States for the district of Iowa:

The petition of Frederick A. Foster respectfully showeth, that your petitioner is a resident and citizen of the city of New York, in the State of New York; that the Mississippi and Missouri River Railroad Company, one of the defendants to the above-entitled suit, was organized under the laws of the State of Iowa, for the purpose of constructing a railroad therein. That, on the 8th day of May, A. D. 1857, the said railroad company executed a mortgage, bearing date of that day, to Thomas E. Walker and Curtis B. Raymond, trustees, for the uses and purposes therein mentioned. That by said mortgage the said railroad company conveyed to said trustees, and their successors, all and singular the roadway, stations, depot lands, and other lands appurtenant to said railway, then owned or thereafter to be acquired by said company, constituting or belonging to the railroad of said company, extending from Iowa City, in the State of Iowa, to Council Bluffs, on the Missouri river, and the appurtenances thereof, and the right, title, and interest of said company to all the public lands of the United States granted by the act of Congress of May 15, 1856, to the State of Iowa, and by the act of the legislature of the State of Iowa, of July 14, 1856, to said company in trust for the benefit of the holders of bonds issued by said company, not exceeding in all $7,000,000 in amount,

being severally bonds for $1,000 each, dated May 8, 1857, payable May 8, 1877, to Clark Durant, or bearer, with interest at seven per cent. per annum, payable semi-annually, payable on the 8th days of November and May in each year, until the payment of the principal, on the presentation of the interest warrants or coupons, to such bonds annexed, at the said company's office, in the city of New York, with the usual powers to said trustees and their successors, upon default to pay interest, to enter upon, foreclose, and sell the mortgaged premises for the satisfaction of said bonds.

That, under and pursuant to said mortgage, the said railroad company issued and sold to divers persons said bonds, to the sum of $3,612,000, or thereabouts, and that ten of said bonds, with all the coupons thereof, from and including the coupon payable on November 8, 1868, are now owned and held by your petitioner.

That the said Curtis B. Raymond having declined to act as trustee under said mortgage, one Franklin Haven was appointed, in accordance with the provisions of said mortgage, to act as one of the trustees in his place. That the said railroad company, being in default in the payment of interest on said bonds, the said Thomas E. Walker and Franklin Haven, as trustees under said mortgage, filed their cross-bill in a certain cause pending in this court, on the original bill of Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, jr., complainants against the said railroad company, Edward W. Dunham, Thomas E. Walker, Franklin Haven, Mark Howard, and John Weber, defendants.

That in said cross-bill they prayed a foreclosure of said mortgage, and the sale of said mortgaged premises for the satisfaction of the moneys owing thereon; that, on the 8th day of May, 1866, it was in said cause decreed in and by this court, among other things, that there was due upon said bonds, for principal and interest, $4,239,982 71, to be paid to said trustees; that, in default of payment within a time fixed, the said mortgaged premises should be sold, and the proceeds of said sale should be applied to the payment of the said land-grant bonds and the over-due coupons thereto attached; that, pursuant to said decree, the said mortgaged premises were sold, all of which will more fully appear by the records of this court in said cause, to which this petitioner craves leave, for greater certainty, to refer.

That no part of the proceeds of said sale has been paid to the plaintiff in this action, nor upon said ten bonds, or any of them, held and owned as aforesaid, nor has the said company

caused the said ten bonds, or the interest thereof, or any part of the same, to be paid; that the same remains wholly due and unpaid and owing to the plaintiff.

That on or about the 20th day of October, A. D. 1865, and prior to the said foreclosure and sale, an arrangement or agreement was made by and between the said Mississippi and Missouri Railroad Company and other parties, including some of the holders of the bonds of the class above described, by which it was agreed that a portion of the proceeds of said sale, which of right was applicable to the payment of said bonds, should be withheld from such application, and improperly applied to the payment to the stockholders of said company, sixteen per cent. of the par amount of their stock therein, while the holders of said bonds should receive but seventy per cent. of the amount due them on the bonds; that your petitioner and those who held the ten bonds above mentioned were not parties to such arrangement or agreement; have never assented to or approved the same; that your petitioner is informed and believes that the holders of a large number of the bonds of said class have never assented to or agreed to be bound by said arrangement.

That by reason of said arrangement or agreement, a portion of the proceeds of the sale of the mortgaged property and other property of said company, a sum amounting to over $500,000 has been set apart to the payment of said sixteen per cent. to the said stockholders.

That the plaintiffs in this cause, being general creditors of the said Mississippi and Missouri Railroad Company, having no lien upon the property of said company, or the proceeds arising from the sale thereof, by virtue of being holders of its mortgage bonds or of judgments against it prior to the mortgage executed as above recited, filed their bill in this cause, praying the application of said fund to the payment of their claims against said company.

That as your petitioner is informed, this court has by its decree ordered the payment of the said fund by the Chicago, Rock Island, and Pacific Railroad Company, and George W. Stanton, jr., John Elliott, and Blakeley Wilson, to one B. F. Allen, as receiver of this court, to be distributed to the several complainants and intervenors herein, and applied in payment, as far as the same is adequate, of the demands which they have and hold against the said Mississippi and Missouri River Railroad Company, all of which will more fully appear by the record of this cause in this court, to which, for greater certainty, the petitioner refers.

That neither this petitioner nor any prior holder of his said ten bonds has at any time assented to said arrangement or agreement for the payment of said proceeds to said stockholders, or to the complainants in this suit; that he has not in any manner relinquished or waived his rights to payment in full of said ten bonds, and all moneys due thereon, out of the proceeds of said sale; that, as petitioner is informed and believes, many other persons holding bonds of said class, amounting to several hundred thousand dollars, have never assented to such agreement or application, or in any manner waived their rights to an application of said fund to the payment of their several bonds, and all the sums due thereon, in full; that the petitioner and said persons, nor any of them, were parties to the action when said decree was entered; that in law and equity they are entitled to receive payment in full of the bonds held by them out of said fund; that the petitioner has reason to fear, and does fear, that if said fund is now distributed by the receiver of the court to the several complainants and intervenors named in the decree, in the manner and form therein directed, such distribution will inflict irreparable injury upon the petitioner and those who hold bonds entitled to priority over said complainants and intervenors in the application of said fund, by scattering the same and placing a considerable portion thereof in the hands of persons whose pecuniary responsibility is unknown, and some of whom reside in foreign countries beyond the jurisdiction of the courts of the United States.

That your petitioner, pursuant to the advice of counsel, has commenced, and is now prosecuting, in the supreme court of the city and county of New York, an action against the said Mississippi and Missouri River Railroad Company, George W. Stanton, jr., John Elliot, Blakeley Wilson, the Chicago, Rock Island, and Pacific Railroad Company, Thomas E. Walker, and Franklin Haven; that in his complaint, in said cause, he substantially stated the allegations hereinbefore contained, excepting those touching this cause and the decree herein; that in said complaint he prays the judgment of the court against said defendants; that the said bonds of your petitioner, and of all others who have not assented to the arangement and agreement above mentioned, with all interest accrued thereon, may be paid in full out of the proceeds of said sale, and that no part of said proceeds be paid to the stockholders of the said Mississippi and Missouri River Railroad Company, or to the general creditors thereof, until the bonds of the plaintiff and like non-assenting bondholders shall

have been paid in full; that he is now prosecuting said suit, and is willing that the plaintiff and intervenors herein may come in and defend the same.

That petitioner is informed and believes that an appeal has been taken from the decree in this court in this cause to the Supreme Court of the United States, but that no supersedeas bond has been filed in said appeal, and that the filing of such a bond now would not be effectual to suspend the execution of the decree.

Wherefore plaintiff prays the court to make an order directing the receiver in this cause to convert the bonds and coupons which now are or may hereafter come into his possession, under and by virtue of said decree, into money in the manner directed in said decree, and that he refrain from distributing the same to the complainants and intervenors herein under the directions of said decree, until the final disposition of this cause in the Supreme Court of the United States, and of the cause pending in the supreme court of the city and county of New York, or if the court shall deem this relief improper under the circumstances of the case, it will make an order restraining the distribution of said fund, and directing that, upon proper pleadings to be filed in this court, an issue be joined between this petitioner and the other holders of said bonds who have never assented to said agreement and arrangement, and the complainants and intervenors herein, to determine and settle the priorities of the right of the parties to an application of said fund.

And your petitioner will ever pray.

FREDERICK A. FOSTER,
By WITHROW AND WRIGHT,
His Solicitors.

UNITED STATES OF AMERICA, *ss.*

Thomas F. Withrow, being duly sworn, deposes and says, that he is one of the solicitors for Frederick A. Foster, the petitioner above set out; that he has been authorized to represent the said petitioner in this court, in the proceedings touching the subject-matter of said petition; that he has authority to present said petition to this court; that he has read the same and knows the contents thereof; and that the allegations therein contained are true as he verily believes.

THOMAS F. WITHROW.

Subscribed and sworn to by Thomas F. Withrow, before me, this 27th day of October, 1868.

W. G. WOODWARD, *Clerk.*

As will fully appear by a copy of said petition in said transcript No. 344, pages 129 to 132.

These respondents, further answering, say, that on the 29th day of October, A. D. 1868, leave was, on motion, granted to said Foster to file said petition, and it was ordered that the distribution of the fund by the receiver in pursuance of said decree be suspended until the determination of the appeal in the Supreme Court, and until the further order of said circuit court, with leave to the complainants to move, at the next term of said court, in case said appeal should not then have been argued and submitted, to set aside and rescind that order, as will fully appear by a copy of said order, on page 248, of said transcript, of record No. 344.

These respondents further state, that on the 10th day of April, A. D. 1869, one John V. McCollum, filed in said circuit court a motion for leave to file a petition thereto attached, which petition and affidavits thereto attached are fully set out in said transcript of record No. 344, pages 249 to 253, and was in substance as follows:

On this day, to wit, the 10th day of April, A. D. 1869, came John V. McCollum, by Scammon, McCagg and Fuller, his solicitors, and files in said clerk's office a motion, with a petition appended, which motion and petition are in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

MARK HOWARD AND JOHN WEBER and others, complainants,
vs.
THE CITY OF DAVENPORT, THE CHICAGO, Rock Island and Pacific Railroad Company, and others, defendants.
} In equity.

And now comes John V. McCollum, of the city and county of Philadelphia, State of Pennsylvania, who is a citizen of said State of Pennsylvania, and prays leave of this honorable court to file his petition, herewith presented and shown to the court, in the above entitled cause, and that, upon filing the same, he may be allowed such relief in the premises as he shall appear

entitled to, according to the rules and practice of this court, and as shall to justice and equity appertain.

APRIL 8, 1869.

By his solicitors SCAMMON, MCCAGG & FULLER.

Endorsed: Filed May 10, 1869.

GEORGE CORKHILL, *Clerk*.

UNITED STATES OF AMERICA, *District of Iowa.* } *ss.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.—EIGHTH JUDICIAL DISTRICT.

MARK HOWARD, JOHN WEBER, JOSEPH Young, Clark Durant, Thomas W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Margaret Nisbet, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, and Jared F. Harrison,

vs.

THE CITY OF DAVENPORT, THE CHICAGO, Rock Island and Pacific Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson.

} In equity.

To the judges of the Circuit Court of the United States for the district of Iowa.

John V. McCollum, of the city and county of Philadelphia, in the State of Pennsylvania, who is a citizen of the State of Pennsylvania, respectfully shows unto your honors—

That he is the owner and holder of eighty-four (84) bonds of one thousand ($1,000 00) each, and three (3) bonds of five hundred dollars ($500) each, representing and amounting in all to the sum of eighty-five thousand five hundred dollars ($85,500 00,) issued by the Mississippi and Missouri Railroad Company, a corporation created under and by virtue of the laws of the State of Iowa, together with the coupons attached to said bonds, some of which are long since past due, and others not yet due; and that he is also the owner and holder of coupons to the amount of twenty-eight thousand dollars ($28,000,) which were attached to other bonds issued by said railroad company; and which are all past due and wholly unpaid, and

the originals of said bonds and coupons this petitioner will present and prove in this court as the court may hereafter require.

Petitioner further shows unto the court, that all of said bonds and coupons were secured by the mortgages issued by said Mississippi and Missouri Railroad Company, as stated in the bill and shown in the proofs and exhibits now on file in this court in the above entitled cause, to which, for greater and sufficient certainty this petitioner craves leave to refer, and makes the same a part of this petition.

And this petitioner further shows unto the court, that the aforesaid bonds and coupons are wholly unpaid, and that neither he, nor any other person or corporation on his behalf, has ever made any agreement or arrangement for the collection and payment of said bonds and coupons for a less sum than the amount upon the face thereof stipulated to be paid; and so your petitioner states and shows unto your honors that the said bonds and coupons are still unpaid, and payable according to the original tenor thereof; and being secured as above stated by mortgages upon the property and franchises of said Mississippi and Missouri Railroad Company, the same are to be paid out of the assets and property of said company in the order by which the same were secured by the mortgages given for that purpose, in preference to the general creditors of said corporation, whether by judgment or otherwise, whose claims are subsequent in point of time and subject in order of security to the aforesaid bonds and coupons belonging to this petitioner.

And your petitioner further shows unto your honors, that by reason of the premises, he is entitled to have his aforesaid bonds and coupons paid out of the funds now in this court, or under its control, realized from the sale of the property and franchises of the said company, under the authority and by the proceedings set forth and shown in the bill, answer, evidence, exhibits, and proceedings in the above entitled cause now on file in this court, and which, as this petitioner is informed and verily believes the fact to be, as appearing upon the records of this court, amounts to about the sum of five hundred and forty-one thousand five hundred and twenty-seven dollars ($541,527,) and which paymens should be made to your petitioner before anything is paid to the complainants in this cause, Mark Howard, John Weber, Joseph Young, Clark Durant, Thomas W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsy Tracy, Harriet Le Conte, Margaret Nisbet, Joseph W. Clark, Volkert P. Dow,

Christopher Y. Lansing, and Jared F. Harrison, or any claims represented in this court by the defendants, the Chicago, Rock Island and Pacific Railaoad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, inasmuch as the bonds and coupons belonging to your petitioner, and described in the schedule hereto attached, are prior in order of lien and of security, as this petitioner is advised, informed, and believes, to any and all the claims represented by the parties complainant in this suit.

Wherefore this petitioner files his affidavit herewith, marked Exhibit "B," and prays that the same may be taken as a part of this his petition; and thereupon prays that upon the final hearing of this cause, this court will order, direct, and decree that the aforesaid bonds and coupons belonging to this petitioner shall be first paid to him, together with all arrearages of interest thereon, out of the funds now in this court or under its control in the hands of B. F. Allen, receiver, before any part of said fund shall be distributed and paid to any of the other parties to this suit, and the proceedings therein now pending in this court, together with his legal costs in this behalf.

And may it please your honors to grant unto your petitioner such other and further relief in the premises as in justice and equity he shall appear entitled to.

By his solicitors SCAMMON, MCCAGG, AND FULLER.
SAM. W. FULLER, *of Counsel.*

Exhibit "B."

UNITED STATES OF AMERICA,
Eastern District of the State of Pennsylvania, } *ss.*
County of Philadelphia.

John V. McCollum, of said county of Philadelphia, in the State of Pennsylvania, being first duly sworn, deposes and says, that he is the owner and holder of eighty-four bonds of one thousand dollars each, and three bonds of five hundred dollars each, representing in all the sum of eighty-five thousand five hundred dollars, ($85,500.) of the Mississippi and Missouri Railroad Company, together with the coupons thereon, long since past due, as well as those not yet due, and also coupons to the amount of twenty-eight thousand ($28,000) dollars on other bonds of said company, all past due and remaining unpaid, all of which said bonds and coupons are se-

cured by mortgage on the railroad and property of said company.

And this deponent further says, that he has never made, entered into, or had any arrangement or understanding with any person or corporation whatever, for the collection of said bonds or coupons, or any part of the same, or consented to any such arrangement, nor to the best of his knowledge or belief have said bonds or coupons, or any of them, ever been subject to any such arrangement or agreement; but the same and the amount represented thereby are now a valid lien against said company and its property, secured by mortgage, as hereinbefore stated.

And this deponent further says, that he has not, nor have any of the prior holders of the bonds, so as aforesaid owned by this deponent, ever made, had, or entered into any arrangement by which he or they would or should receive any amount in satisfaction of such bonds or coupons, or any of them, less than the full amount due thereon, nor were these bonds or coupons, or any of them, ever subject to any arrangement or agreement, made, as this deponent is informed, some time in the latter part of the year A. D. 1865, between George W. Stanton, jr., John Elliott, and Blakely Wilson, committee, and such stockholders and bondholders of the said Mississippi and Missouri Railroad Company as should assent thereto, respecting the stock and bonds of said company.

And this deponent further states, that he is informed and believes that in a certain cause in the circuit court of the United States, held in and for the district of Iowa, wherein Mark Howard and others were complainants, and the city of Davenport, the Mississippi and Missouri Railroad Company, and others were defendants, a certain decree was, at a term thereof begun and holden on the 12th day of May, A. D. 1866, entered, among other things providing that the Chicago, Rock Island and Pacific Railroad Company, (which, as he is informed and believes, had become the purchaser of the said Mississippi and Missouri Railroad Company's property, land, and franchises, for the sum of five million five hundred thousand dollars ($5,500,000,) of which five hundred and fifty-two thousand three hundred and twenty dollars was agreed to be reserved and distributed among the stockholders of the said Mississippi and Missouri Railroad Company, being equal to sixteen per cent. on the par value of the stock of said company) should pay over and deliver to B. F. Allen, as receiver, the sum of five hundred and forty-one thousand five hundred and twenty-seven dollars, (being part of said sixteen per cent. on the par

value of stock, as hereinbefore stated,) either in cash or bonds of said Chicago, Rock Island and Pacific Railroad Company; that he should convert the said bonds so received into cash, and from the funds so realized and in his hands pay the costs of said suit in which said decree was rendered, and his own costs, and apportion the balance remaining in his hands among the several complainants in said suit in a manner specifically provided in said decree.

And this deponent further says, that he is informed and believes that said fund is now in the hands of said receiver in cash and bonds.

And this deponent further states, that he is informed and believes that the complainants in said suit are severally general creditors of said Mississippi and Missouri Railroad Company, who have recovered judgments against said company, which said judgments are liens subsequent to, and subject to the lien of this deponent, under the said mortgage or mortgages securing his said bonds or coupons; that the fund so ordered to be distributed in and by said decree wholly arises from the sale of property covered by the said mortgage or mortgages so securing said bonds and coupons, and is a corporate fund, and, as he believes, is first subject to the payment of the said indebtedness of said Mississippi and Missouri Railroad Company, so as aforesaid held and owned by this deponent, and is, so far as he knows, the only fund now remaining, and the only property out of which the said indebtedness so held and owned by him can be collected.

And this deponent further says, that he is informed and believes that an application is soon to be made to have said fund distributed among the complainants in said suit, under the order of said court; that legally and equitably, as he believes, he is entitled to have the said indebtedness held by him first paid out of the same, and unless it is so paid he knows of no way in which he can ever collect or receive the same.

And this deponent further says, that he is informed and believes that the mortgage or mortgages securing his said bonds have been foreclosed in the said circuit court of the United States in and for the district of Iowa, and a sale of all the property and franchises of the said Mississippi and Missouri Railroad Company had in pursuance of the decree of said court, and that the fund now in the hands of said B. F. Allen, receiver, and hereinbefore referred to, is part of the proceeds of said sale, and is the only balance remaining of said sale.

And this deponent further says, that he has placed his said bonds and coupons, and all his rights and interests in the matters

in this affidavit referred to, in the hands and control of Messrs. Scammon, McCagg, and Fuller, attorneys at law, of Chicago, Illinois, with full authority and direction in and to them to take all such steps and institute all such suits or proceedings as shall seem to them necessary or expedient to assert or protect his rights or interests in the premises.

J. V. McCollum.

Sworn to and subscribed before me this 27th day of March, A. D. 1869.

W. Grier Hibler,
U. S. Commissioner.

And these respondents further answer and say, that on the 15th day of April, A. D. 1869, one Joshua Bardwell filed, in the clerk's office of said circuit court for the district of Iowa, his petition, entitled in said cause of Howard *et al. vs.* the City of Davenport *et al.*, which appears on pages 253 to 256 of said transcript of record No. 344, and was in substance as follows:

UNITED STATES OF AMERICA, DISTRICT OF IOWA.

Mark Howard and John Weber, Complainants, and Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Margaret I. Nisbet, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, and Jared F. Harrison, intervening claimants, and joined as complainants herein,

vs.

The City of Davenport, the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, George W. Stanton, jr., John Elliott, Blakely Wilson, the city of Muscatine, the city of Iowa City, and the county of Scott.

In the circuit court of the U. S. for the district and circuit of Iowa. No. 69 chancery.

To the honorable judges of the circuit court of the United States, in and for the circuit and district of Iowa.

Joshua Bardwell, your petitioner, respectfully represents that he is a citizen and resident of the State of Massachusetts;

that he has an interest in, and is entitled to, a portion of the fund in controversy in the above-entitled cause, and now in the hands of a receiver appointed by this court; that the claim of your petitioner to a portion of said fund is adverse to all the parties to said action, and is not derived from or through the claimants of said fund in said action, and is in nowise affected or determined by the order and decree heretofore rendered in said cause.

That on the eighth day of May, A. D. 1857, the Mississippi and Missouri Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, for the purpose of constructing a railroad therein, executed to Thomas E. Walker and Curtis B. Raymond, as trustees, for the uses and purposes therein mentioned, a mortgage, by which said company conveyed to said trustees and their successors, all and singular the roadway, stations, depot lands, and other lands appurtenant to said railway, then owned or thereafter to be acquired by said company, extending from Iowa City, in the State of Iowa, to Council Bluffs, in said State, and the right, title, and interest of said company to all the lands of the United States granted by the act of Congress of May 15th, 1856, to the State of Iowa, and by the act of the legislature of the State of Iowa of July 14, 1856, to said company, together with all the locomotives, cars, buildings, machinery, tools, or implements belonging to said company, and all the rights, franchises, and privileges appurtenant to said road, then existing or thereafter to be acquired, in trust for the holders of bonds authorized to be issued by said company in any amount not exceeding the sum of seven millions of dollars, in bonds of one thousand dollars each, each of said bonds bearing date May 8th, 1857, and payable on the 8th day of May, A. D. 1877, to Clark Durant, or bearer, with interest at the rate of seven per cent. per annum, payable semi-annually, on the eighth days of November and May in each year until said bonds shall become due.

That said railroad company, on said eighth day of May, A. D. 1857, issued and sold a large number of bonds of the denomination of one thousand dollars each, severally payable on the eighth day of May, 1877, to said Clark Durant, or bearer, with interest coupons attached for the payment of semi-annual interest thereon at the rate of seven per cent. per annum, one of which was payable on the eighth day of May and on the eighth day of November of each year until the maturity of said bonds.

And on the eighth day of May, A. D. 1863, the said rail-

road company issued, sold, and delivered a large number of bonds known and designated as income bonds, being bonds issued for past due interest coupons on said bonds so executed by said company on the eighth day of May, A. D. 1867.

That on the tenth day of December, A. D. 1861, said railroad company executed to Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, jr., as trustees for the uses and purposes therein named, a mortgage conveying all of said property mentioned and described in the mortgage herein above referred to, to secure the payment of a large number of other bonds then issued, sold, and delivered by said company, and described in said mortgage; each of which bonds was for the sum of one thousand dollars, payable to said Clark Durant, or bearer, on the first day of January, A. D. 1882, with interest at the rate of seven per cent. per annum, payable semi-annually, for which interest coupons were attached, payable on the first day of June and January of each year until the maturity of said bonds.

That said company also, at different other times, executed to different other parties different other bonds, also secured by other mortgages on said property described in said mortgages, executed by said company.

And for more greater certainty and more definite statement as to the several mortgages executed by said railroad company, and the several bonds and debts of said company mentioned and described therein, and secured thereby, and for more definite description of the property so mortgaged, petitioner prays leave to refer to the record in the case of Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, Jr., complainants, against said railroad company, to which the trustees named in the said several mortgages were parties, lately pending in this court, and makes the record in said cause a part of this petition.

Petitioner further says, that such proceedings were had in said last-mentioned action in this court, that a decree was rendered in favor of the several trustees in said several mortgages, against said railroad company, for several sums amounting in the aggregate to the sum of $7,482,035 34, and a decree of foreclosure and sale of said property to pay off and satisfy said several sums; that all of said property was sold pursuant to said order and decree of said court, and the Chicago and Rock Island Railroad Company became the purchaser thereof, at and for the sum of $5,500,000, and that the holders of the several bonds secured by the said several mortgages foreclosed in said action are entitled to the application of the proceeds

of said sale according to the priorities of the several mortgages by which their respective bonds were secured.

And your petitioner further represents, that the funds in controversy in this action, being the sum of $552,400, in the hands of B. F. Allen, a receiver appointed by this court, is a part of the proceeds of said sale.

And that said funds were put into the hands of the said George W. Stanton, Jr., John Elliott, and Blakely Wilson, defendants in this action, with intent and for the purpose of diverting them from the payment of the said several bonds sacured by said several mortgages, according to their several priorities as ascertained and determined by this court in said action to foreclose said mortgages, under and in pursuance of an alleged agreement between a portion of the bondholders and a portion of the stockholders of said company, by the terms and stipulations of which proper proceedings were thereafter to be had for the foreclosure of the several mortgages, executed by said company to secure said bonds, and that sixteen per cent. of the proceeds of said sale should be given to the stockholders of said company.

That after the sale of said property under the proceedings to foreclose said mortgages, the one-sixteenth of the proceeds thereof, being the amount and the fund in controversy in this action, was put into the hands of George W. Stanton, Jr., John Elliott, and Blakely Wilson, and by them transferred to the said receiver herein.

Petitioner further shows, that at the time of making said alleged agreement by a portion of the bond and stockholders of said company, he was, and ever since has been, and still is, the owner of five of the bonds of said company, secured by the mortgage executed by said company on the 8th day of May, A. D. 1857, one bond of the class designated as income bonds, and one bond issued by said company, secured by said mortgage of said company, executed on the 10th day of December, A. D. 1861, as hereinbefore stated, with the several coupons thereto attached; and that there is now due to him thereon the sum of about $9,000; and that he is entitled to the payment thereof out of the money in the hands of the receiver in this cause according to the priorities of the several mortgages by which they were secured, as aforesaid.

Petitioner further shows, that he was not present at the making of said alleged agreement between said bondholders and stockholders of said company; never assented to said agreement, or in any manner consented to the diversion of said six-

teen per cent. of the proceeds of the sale of said property, or of any other sum, from the payment of said bonds.

Petitioner further shows, that a large number of the holders of said bonds, and the owners of a large amount thereof, were not parties to said alleged agreement, and have never in any manner consented to the diversion of any portion of the proceeds of said sale from the payment of said bonds, and that the lien of petitioner and the holders of said bonds who have not assented to said alleged agreement is prior and paramount to any right, lien, or interest of the said Mark Howard, John Weber, and other parties joining with them as complainants in this action to said fund.

Wherefore, petitioner prays that an account may be had and taken of the bonds held by persons who did not enter into said alleged agreement, and have in no manner assented to or ratified the same; and in order thereto that a special master be appointed by this court to inquire and report how many and what bonds were represented by the holders thereof, at the meeting of the bondholders and stockholders of said company, at which said agreement is alleged to have been made; and that on the final hearing hereof, the court may find and determine the amounts and priorities of the several bonds secured by said several mortgages, and order, adjudge, and decree that said fund now in the hands of the receiver in this case be applied to the payment and discharge of said bonds, according to the ascertained priorities thereof, before any portion thereof is applied to the payment of the claims of complainants, according to the decree of the court heretofore rendered in this cause, and for such other and further relief as may be just and equitable.

POLK, HUBBELL & BARCROFT,
Attorneys for Petitioner.

Endorsed: Filed April 15, 1865.
GEORGE B. CORKHILL, *Clerk.*

And these respondents further ~~avow~~ aver and say, that on the 15th day of May, 1869, one H. S. McComb filed in the clerk's office of said circuit court for the district of Iowa his petition and motion, entitled in said cause of Mark Howard *et al. vs.* The City of Davenport *et als.*, which appear on pages 259 to 262 of said transcript of record No. 344, and were in substance as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

MARK HOWARD *et al.*, pl'ffs.
vs.
THE CITY OF DAVENPORT *et al.*, def'ts. } 69 Chancery.

And now comes H. S. McComb, a citizen and resident of the State of Delaware, at the city of Wilmington, in said State, and by his attorney moves the court for leave to file his petition herein, claiming an interest and lien upon the funds in the hands of B. F. Allen, a receiver appointed in said cause, and under the control of this court, and asks that, on the filing and hearing of said petition, the court may find and determine the extent of the interest of said petitioner in said fund, and that it may order, adjudge, and decree that the lien of petitioner is prior and paramount to any and all claims of the parties joining as complainants in this cause, and that such fund, or so much thereof as may be necessary for that purpose, be applied to the payment and satisfaction of the amount found due petitioner, and such other relief as petitioner may be entitled to receive.

C. C. NOURSE,
Attorney for Petitioner.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

MARK HOWARD
vs.
THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY. }

To the Circuit Court of the United States for the district of Iowa.

Your petitioner, H. S. McComb, a citizen of the city of Wilmington, and State of Delaware, of the United States of America, shows to the court—

That heretofore, to wit, before the execution of the deed of trust and mortgages hereinafter set out, the Mississippi and Missouri Railroad Company was organized a body corporate under the laws of the State of Iowa, for the purpose of constructing and operating a railroad within said State.

That in pursuance of said purpose, and according to the authority of the articles of incorporation, said company afterwards, to wit, on the day of , 185 , executed their

certain trust deed, conveying to the trustees therein named, to wit, Thomas C. Durant and Jacob S. Wetmore, in trust for the uses and purposes therein named, all the right, title, and interest of said company then or thereafter acquired, in and to the railroad of said company, the equipments and appurtenances thereof, from the city of Davenport to Council Bluffs, Iowa; and also all the right, title, and interest which the said company now have or shall hereafter acquire in and to all public lands of the United States, granted by act of Congress, approved May 15th, 1856, to the State of Iowa, and by the general assembly of the State of Iowa by act approved July 14, 1856, granted to said Mississippi and Missouri Railroad Company; that said conveyance and deed as aforesaid was in trust to secure bonds then about to be and thereafter issued, known as second mortgage construction bonds, in an amount not to exceed seven hundred thousand dollars, subject, nevertheless, to any prior mortgages or liens theretofore created on said road.

That under and by virtue of said trust deed the said Mississippi and Missouri Railroad Company issued and sold their bonds in the market, to an amount unknown to your petitioner, in sums of five hundred and one thousand dollars each, with interest at seven per cent. per annum, payable semi-annually, and with coupons attached for the payment of said interest, which said bonds were payable on the first of January, 1882.

That of the bonds so issued your petitioner is now the owner and holder of a bond for the sum of five hundred dollars, issued on the 10th day of December, 1861, payable to C. W. Durant or holder or bearer thereof, with interest as aforesaid, payable on the 1st of July and January of each year, which said bond is No. 750 of the series so secured by the deed of trust aforesaid, and that the said bond with coupons attached, except as to the first two years' interest after the date of the bond, remains the property of petitioner and is wholly ununpaid.

Your petitioner further states that he is now the owner and holder of receipts of the treasurer and register of the said Mississippi and Missouri Railroad Company No. 210, dated February 1st, 1864, for interest coupons of the first mortgage construction bonds of said railroad company, to the amount of two hundred and fifty-two and fifty-one hundredth dollars issued as scrip by said company, convertible into the second mortgage construction bonds of said company according to the terms of agreement bearing date October 1st, 1862, whenever presented in sums of five hundred or one thousand dollars,

being the denomination of said second mortgage construction bonds.

That said coupons were surrendered under said agreement, and that petitioner is and was entitled to claim an interest in the mortgage given to secure said bonds to the amount of said receipt or scrip.

Your petitioner further shows, that heretofore, to wit, on the 5th day of , 1866, Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, Jr., filed their bill in this court against the said Mississippi and Missouri Railroad Company *et al.*, to foreclose certain mortgage liens upon the railroad, land grant, franchise, road bed, and other property, in which all the parties having or claiming liens on said road and other property of said company were parties either plaintiff or defendant, and that the trustees aforesaid in the deed of trust first hereinbefore set out, to secure among others the bonds held by your petitioner and the coupons surrendered as aforesaid and the scrip aforesaid, were made parties.

That on the 8th day of May, 1866, it was in said cause decreed, in and by the court, among other things, that there was due on the several mortgages and deeds of trust described in said decree and foreclosed in said proceeding, for principal and interest, the sum of $7,182,545 37 to be paid to the trustees in said several mortgages and deeds of trust set up in the several bills of complaint and cross-bills of the several defendants in the said suit, and that in default of such payment within a term fixed in said decree, the property of said Mississippi and Missouri Railroad Company hereinbefore described was decreed to be sold for the satisfaction and payment thereof, all of which will more fully appear by the record of said cause now in this court, to which reference is made herein for greater certainty and made a part of this petition.

That no part of the proceeds of said sale has been paid to the plaintiffs in this action, nor has anything been paid upon the bonds of complainant hereinbefore described, or the scrip for the coupons surrendered as aforesaid, nor has the interest on any part thereof been paid either by said company or said trustees.

Petitioner further shows that, on or about the 20th day of October, A. D. 1865, and prior to said foreclosure and sale, an arrangement and agreement was made by and between the Chicago and Rock Island Railroad company, a body corporate under the laws of the State of Illinois, and other parties, including a portion of the holders of the said mortgage bonds, of the class named in the deed made to secure the debt due

your petitioner, by which it was agreed by the parties to said agreement to sell the property of the said company, included in the trust deed, made to secure your petitioner's debt for the sum of $5,500,000, and to divide the proceeds of the said sale, in part, to stockholders of said Mississippi and Missouri Railroad Company, and a part to the payment of a percentage only of the bonds secured by the mortgages and trust-deeds aforesaid, and that it was further agreed to convey the title to the purchaser by means of a foreclosure of said mortgages and trust-deed, and to pass the title under a decree and sale by this court.

Petitioner expressly avers that he never assented to said agreement, and never at any time has consented to accept of a percentage in payment of the bond and coupons aforesaid, and was never a party in any manner thereto. Petitioner shows, that in pursuance of said agreement, said property so described in the trust-deed, made to secure the petitioner's debts, was bid off by the Chicago, Rock Island and Pacific Railroad Company, at the sale by the master, at the nominal sum of $2,100,000, but that, in truth and in fact, the purchaser of said sale had agreed with the trustees and other parties in interest to pay, and the true consideration of the deed and sale was, the sum of $5,500,000.

That under said arrangement and agreement, it was agreed that the stockholders of the Mississippi and Missouri Railroad Company should have of the proceeds of the sale of said property the sum of sixteen per cent. of the par amount of stock held by them, and that, under said agreement, the sum of about $560,000 of the proceeds of said sale has been reserved and set apart for the benefit of said stockholders of said Mississippi and Missouri Railroad Company.

Petitioner further shows that the plaintiffs in this cause are general creditors only of the said Mississippi and Missouri Railroad Company, and have no lien upon said fund or any part thereof, and that the same is the proceeds of the sale of the property pledged to secure the debt due your petitioner.

That, as petitioner is advised, the sum of $560,000, and accrued interest thereon, is now in the hands of a receiver of this court, and is under its control for the purposes of distribution.

Your petitioner shows further, that according to said arrangement and agreement to which petitioner was made a party, he is advised and believes that the trustees named in said trust deed have not come into possession of any of the proceeds of the said sale, and that by the terms of said agree-

ment your petitioner cannot receive any per cent. of the amount due him, not having assented thereto; that the said Mississippi and Missouri Railroad Company is insolvent, and that the property aforesaid, so sold and disposed of as aforesaid, constituted all of its property, and petitioner has no other means of obtaining payment of his debt except by the equitable order of this court ordering a pro rata distribution of the same to your petitioner, according to his rights and priority as hereinbefore set out and claimed.

Your petitioner, therefore, prays the court that such proceedings may be had, that petitioner may be permitted to prove his claim against the Mississippi and Missouri Railroad Company, and may be decreed payment of his debt out of the funds now in the hands of the receiver as aforesaid, and now under the control of this court, or of such equitable and *pro rata* share thereof as in equity and good conscience petitioner is entitled to receive, and for such other, further, and full relief as petitioner is entitled in equity and good conscience to have.

C. C. NOURSE,
Att'y for Petitioner.

UNITED STATES OF AMERICA, }
District of Iowa, } *ss.*

I, Charles C. Nourse, being duly sworn according to law, do depose and say, that I am the attorney of petitioner in the above petition, and that I now have in my possession the bond and scrip set forth in said petition and hold the same for collection, with full authority to take such steps in the premises as will secure the rights of the petitioner; that said petitioner, H. S. McComb, is not in the State of Iowa, and cannot in person make affidavit to his petition, and that a delay to obtain an oath to the same may seriously prejudice the right of said petitioner in the premises.

That I have investigated the truth of the matters set forth in said petition, and have as full information thereof as the said petitioner, and that I believe the facts set forth and the several allegations of said petition are true.

C. C. NOURSE.

Sworn to and subscribed before me, by C. C. Nourse, this 15th day of May, 1869. GEORGE B. CORKHILL, *Clerk.*

Endorsed: Filed May 15, 1869.
GEORGE B. CORKHILL, *Clerk.*

And these respondents, further answering, say, that on or about the 10th day of May, 1869, the said petitioners appeared in said circuit court, by their counsel, and the said Mark Howard *et als.* by their counsel, before two of these respondents, to wit, Samuel F. Miller, and J. M. Love, and the aforesaid several motions were made and argued, and after hearing said counsel and considering the several motions, the said respondents suggested to all of said claimants that the court was disposed to hold that the petitioners had no lien upon the funds in the hands of the receiver, as mortgage bondholders, but that said petitioners were entitled to claim a share of said fund, as general creditors of the Mississippi and Missouri Railroad Company, in preference to the shareholders in said company, and without announcing any final opinion upon the matter, suggested to the counsel for all parties, that they agree to the entry of a decree at that time, distributing said fund *pro rata* among the several claimants then before the court. To which suggestion of these respondents, the counsel for Mark Howard *et als.* then objected, and these respondents thereupon held the matter of said petitions under advisement.

And these respondents, further answering, say, that having had said petitions and motions under consideration, on, to wit, the 26th day of May, 1869, the following order, or decree, was made in said cause of Howard, *et als.*, *vs.* The City of Davenport, *et al.*, by the said circuit court for the district of Iowa, as will fully appear by reference to pages 267, 268, of transcript of record No. 344, and which was in substance as follows:

MARK HOWARD
vs.
THE CITY OF DAVENPORT *et al.*

And now on this day, the fifteenth day of May, this coming on to be heard on the motion of plaintiffs herein, to compel the defendants, the Chicago, Rock Island, and Pacific Railroad Company, to produce a certain book for the examination of plaintiffs, and the court having heard the argument of counsel, and being fully advised in the premises, overrules said motion.

MARK HOWARD
vs.
THE CITY OF DAVENPORT *et al.* } No. 69.—Eq.

This cause, coming on to be heard on motion of complainants, to distribute a portion of the funds in the hands of the receiver heretofore appointed in this cause, the motion of John V. McCollum for leave to file his petition herein, the motion of Joshua Bradwell for leave to file his petition herein, the motion of H. S. McComb for leave to file his petition herein, and the petition of Frederick A. Foster, heretofore filed herein, after argument of counsel for the respective parties named, and an inspection of the record, and said several motions and petitions, it is ordered, adjudged, and decreed—

First. That the said John V. McCollum, J. Bardwell, and H. S. McComb have leave to file their several petitions, and that the same be considered as filed prior to the entry of this order, and that the petitioners, the said Foster, Bardwell, McCollum, and McComb, have until the July rule day to file a bill consolidating their claims, and setting up more specifically their several claims presented in their several petitions now on file, but no other or further claims, and that they serve a copy of their said bill on James Grant for the use of complainants; that the complainants and intervenors demur, plead, or answer to said bill by the rule day in August following, and that thereafter the parties proceed as in other causes in chancery.

And it is further ordered that the receiver set apart $200,000 of the fund in his hands, and refrain from distributing the same until the further order of the court.

Second. That the prayer of the petitioners above named, for an order restraining the receiver from distributing any of the fund in his hands until their rights to share in the distribution thereof is determined, is refused and denied as to all of said fund except the sum of $200,000, and the motion of the complainants for an order directing the receiver to distribute said fund is sustained as to all except said $200,000; and the receiver is ordered to proceed forthwith to make the distribution of all of said fund except the said sum of $200,000, according to the directions given in the decree herein to the several parties to whom said decree directs such distribution to be made.

That, in order to make such distribution, he will sell and convert into cash, as provided in said decree, all of the bonds of the Chicago, Rock Island, and Pacific Railroad Company in his hands, except the sum of $200,000.

Provided, that such of said parties to whom the distribution is to be made as shall so elect, shall have the right to receive the amounts coming to them, respectively, or any part thereof, in said bonds, in specie, at a price to be agreed upon between them and the receiver, and appointed by a judge of this court, not less than the current market price of the stock exchange in New York at the date of distribution; and the receiver shall deliver the bonds to them in payment at such rate accordingly.

And it is further ordered, (the defendants Wilson and Elliott having filed their written consent thereto as provided by said decree,) that there be paid to said parties entitled thereto, in making such distribution, (so far as said amount to be distributed will suffice therefor, of their claims not yet matured, on the terms and conditions and in the order of priority of payment provided by said decree.

And thereupon the petitioners, Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, and each of them, pray and appeal to the Supreme Court of the United States from the order and decree contained in the "second" paragraph hereinbefore set out, being the order denying and refusing the relief prayed in their petitions, and in the petition of each of them, that the receiver herein be directed to refrain from distributing the fund in his hands, and sustaining complainant's and intervenor's motion for an order distributing a portion of the funds in the hands of the receiver, and directing and ordering a distribution of a part thereof; which appeals are allowed to them, and each of them, upon their filing a bond, with sureties, in the penal sum of five hundred dollars, as provided by law, for the costs of the appeal.

Provided, that in order to supersede and stay execution of said orders and decrees pending the appeal, they shall give bond, with sureties, conditioned and approved as provided by law, in the penal sum of nine hundred thousand dollars.

J. M. LOVE, *Judge*.

Endorsed: Filed May 26, 1869.

GEORGE B. CORKHILL, *Clerk*.

On this day, to wit, the third day of June, in the May term, A. D. 1869, came Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, by Withrow and Wright; Scammon, McCagg and Fuller; Polk, Hubbell and Barcroft; and Nourse and Kauffman, their solicitors, and filed in said clerk's office an appeal bond; which appeal bond is in the words and figures following to wit:

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

Know all men by these presents, that we, John V. McCollum, Josiah Bardwell, H. S. McComb, and Frederick S. Foster, as principals, and Samuel M. Nickerson, Daniel Thompson, Benjamin F. Murphy, George L. Davenport, George A. Davenport, F. R. West, Hoyt Sherman, George C. Tichenor, W. S. Pritchard, and F. W. Palmer, as sureties, are held and firmly bound unto Mark Howard, John Weber, Joseph Young, Clark W. Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Margaret I. Nisbet, Joseph W. Clark, Volkert P. Dow, Christopher Y. Lansing, and Jared F. Harrison, in the sum of $900,000, to be paid to the said Mark Howard and his associates, as plaintiffs in this case, their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 31st day of May, A. D. 1869.

Whereas the above-named John V. McCollum, Josiah Bardwell, H. S. McComb, and Frederick S. Foster, have taken an appeal to the Supreme Court of the United States from said circuit court of the United States for the district of Iowa, to reverse the judgment and decree rendered in the above-entitled suit by the said circuit court of the United States in and for the district of Iowa;

Now, therefore, the condition of this obligation is such, that if the above-named John V. McCollum, Josiah Bardwell, H. S. McComb, and Frederick S. Foster, shall prosecute their appeal to effect, and answer all costs, if they shall fail to make good their plea, and shall in all things abide the judgment of the said United States Supreme Court, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL M. NICKERSON.	[L. S.]
DANIEL THOMPSON.	[L. S.]
BENJAMIN F. MURPHY.	[L. S.]
GEO. L. DAVENPORT.	[L. S.]
GEO. A. DAVENPORT.	[L. S.]
F. R. WEST.	[L. S.]
HOYT SHERMAN.	[L. S.]

GEO. C. TICHENOR. [L. S.]
WM. S. PRITCHARD. [L. S.]
JOHN V. MCCOLLUM, [L. S.]
By SCAMMON, MCCAGG & FULLER, *his Att'ys.*
FREDERICK A. FOSTER, [L. S.]
By WITHROW AND WRIGHT, *his Att'ys.*
J. BARDWELL, [L. S.]
By POLK AND HUBBELL, *his Att'ys.*
H. S. MCCOMB, [L. S.]
Per NOURSE AND KAUFFMAN, *his Attor'ys.*
F. W. PALMER. [L. S.]

The above bond is approved as to the form thereof, and also as to the sufficiency of the sureties for the penalty of the same.
JUNE 2, 1869. J. M. LOVE, *Judge, &c.*

Endorsed: Filed June 3, A. D. 1869.
GEORGE B. CORKHILL, *Clerk.*

And these respondents, further answering, say, that the said John V. McCollum, Frederick A. Foster, Joshua Bardwell, and H. S. McComb prayed an appeal from said order or decree at the time of entering the same to this honorable court, which was allowed by said circuit court, and such appeal was duly perfected so as to become a supersedeas by the said appellants giving a bond in the penal sum of $900,000, which was approved by the circuit court aforesaid, and said appeal was prosecuted by filing the transcript of the record of said cause in this court on the 10th day of December, 1869, where the same is now pending as cause No. 344, of the docket of this term.

And these respondents, further answering, say, that on the 5th day of July, A. D. 1869, the said McCollum, Foster, Bardwell, and McComb filed in the office of the clerk of the said court for the district of Iowa, their joint bill of complaint, in pursuance of said order of said circuit court made at the May term, 1869, entitled in the said cause of Howard, *et al. vs.* The city of Davenport, *et al.*, and against all the parties to said suit, which bill was answered by the defendants therein named on the 21st day of July, A. D. 1869, to which a replication was filed on the 6th day of September, 1869, and on the 8th day of November, 1869, the said cause was heard upon

said pleadings and the proofs of the respective parties, and the following decree entered therein.

UNITED STATES OF AMERICA, *District of Iowa.* } *ss.*

At a term of the circuit court of the United States for the said district, begun and holden at Des Moines, on the third Tuesday, it being the 19th day of October, A. D. 1869.

Present: Hon. J. M. Love, district judge.

MARK HOWARD AND OTHERS *vs.* THE CITY OF DAVENPORT AND OTHERS. } No. 69. Chancery. Original bill.

AND

FREDERICK A. FOSTER, JOHN V. MCCOLLUM, J. Bardwell, and H. S. McComb, *vs.* MARK HOWARD AND OTHERS, complainants and defendants in said original bill. } Consolidated cross-bill.

This cause coming on to be heard at this term, to wit, on the 8th day of November, A. D. 1869, upon the consolidated bill of Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, and the amendment thereto of John V. McCollum, the answers thereto of Mark Howard, and original complainants in the original bill, John Weber, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsy Tracy, Harriet Le Conte, Margaret I. Nisbet, Joseph W. Clark, Volkert P. Dow, Christopher T. Lansing, and Jared F. Harrison, intervening complainants in said above entitled cause, and the Mississippi and Missouri Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, and the Chicago, Rock Island, and Pacific Railroad Company, defendants to said original bill in said cause, all of whom are defendants to said consolidated bill, and the replications of said complainants in said consolidated bill to said answers, and upon motion of all of said defendants to said consolidated bill, except the Chicago, Rock Island, and Pacific Railroad Company, for an order directing the receiver to distribute the fund now held by him in this cause according to the directions of the original decree herein; and thereupon the parties having appeared by their solicitors, and the court having inspected the record, and heard the evidence and the arguments of counsel, and being fully advised in respect thereto, doth order, adjudge, and decree as follows, to wit:

That the complainant, John V. McCollum, is not entitled to

the payment of any portion of the bonds and coupons in said consolidated bill and the amendment thereto described, or to any portion of the same, out of the funds now in the hands of the receiver in this cause; and that the said consolidated bill, as to the said John V. McCollum, be, and is dismissed without prejudice to his rights to recover on said bonds and coupons against the defendant, the Chicago, Rock Island, and Pacific Railroad Company, or other persons.

That the said Frederick A. Foster, J. Bardwell, and H. S. McComb, are severally and respectively entitled to share in the said fund in the hands of the receiver, upon the basis and to the extent hereinafter provided, and no other, to wit, that they and each of them are entitled to pro rata shares or dividends of the said fund, or of the proceeds thereof, on an equal footing with complainants and other creditors joining with them in the said original bill, as provided by said decree therein, to wit, as general creditors of the Mississippi and Missouri Railroad Company, and in proportion to the amounts which were due them respectively upon the bonds, coupons, and scrip set forth in said cross-bill, at the date of the master's report in the said original cause, to wit, the 1st day of March, A. D. 1868. The said amounts are to be ascertained in manner following, to wit:

As to the claim of said Frederick A. Foster, by adding to the principal sum of said bonds held by him, to wit, the sum of $10,000, the amount of the coupons thereon held by him, and matured prior to July 9, 1866, the date of said sale on foreclosure in said cross-bill mentioned, with interest on said coupons from the maturity thereof, respectively, at seven per cent. per annum, down to the 9th day of July, 1866, by then subtracting from said aggregate amount the pro rata proportion of the proceeds of said foreclosure sale properly applicable to the payment of the said Foster's bonds, to wit, twenty per centum of the amount then due thereon; and by then adding to the remainder thus produced interest at the rate of seven per centum per annum from the 9th day of July, A. D. 1866, to said 1st day of March, A. D. 1868.

That the amount so due to the said J. Bardwell on the said 1st day of March, 1868, is to be ascertained, so far as the same grows out of the said first mortgage construction bonds and income bonds held by him as alleged in said cross-bill, in the same manner and by the same rule precisely as is hereinbefore provided in respect to the claim of said Frederick A. Foster; and so far as the same grows out of said second mortgage construction bonds, held by him as alleged in said cross-

bill, in the same manner and by the same rule as is hereinbefore provided in respect to said other bonds, except that no deduction is to be made on account of said proceeds of said foreclosure sale, no part of said proceeds being applicable to said second mortgage construction bonds.

That the amount due to the said H. S. McComb is to be ascertained in the same manner and by the same rule as hereinbefore provided in respect to said Frederick A. Foster, except that no deduction is to be made on account of proceeds of said foreclosure sale, no part thereof being applicable to said McComb's claim.

And it is further ordered, adjudged, and decreed, that the receiver herein, from the funds now in his hands and held under the former decree in this cause, first pay and satisfy the costs of all the parties to the said consolidated bill, as well as the parties to the original bill, together with his own costs and charges in the execution of said original decree and of this decree, to be settled and allowed by the court or a judge thereof; that after the payment of said costs and charges he shall apportion the fund remaining in his hands among the said several original intervening complainants, and the said Frederick A. Foster, J. Bardwell, and H. S. McComb, pro rata in proportion to the amounts of the said claims, as ascertained in the original decree herein and by this decree, including as to the claims of the parties to the original decree those matured and not matured, and which said amounts are as follows, to wit:

To Mark Howard, the sum of four thousand four hundred and four dollars and twenty-two cents, ($4,404 22.)

To John Weber, the sum of ten thousand and two dollars and fifty-nine cents, ($10,002 59.)

To Joseph Young, the sum of five hundred and sixty-two thousand four hundred and twenty-eight dollars and ninety cents, ($562,428 90.)

To Clark Durant, the sum of thirty-six thousand five hundred and sixty dollars and ninety-three cents, ($36,560 93.)

To Charles W. Durant, the sum of twenty-four thousand one hundred and twenty-eight dollars and fourteen cents, ($24,128 14.)

To Robert Murray, the sum of eleven thousand eight hundred and fifty-one dollars and ninety-seven cents, ($11,851 97.)

To Henry Vanderveer, the sum of eight thousand six hundred and thirty-seven dollars and forty-two cents, ($8,637 42.)

To William Elliot, the sum of eleven thousand two hundred and thirty-nine dollars and seventy cents, ($11,239 70.)

To George Bliss, the sum of thirty-eight thousand one hundred and sixty-six dollars and four cents, ($38,166 04.)

To Betsey Tracey, the sum of twenty-one thousand nine hundred and eighty-four dollars and six cents, ($21,984 06.)

To Harriet Le Conte, the sum of twenty-one thousand three hundred and eighteen dollars and seventy-five cents, ($21,318 75.)

To Joseph W. Clark, the sum of twelve thousand seven hundred and twenty dollars and fifty cents, ($12,720 50.)

To Volkert P. Dow and Christopher Y. Lansing, the sum of fifteen thousand seven hundred and ninety-four dollars and eight cents, ($15,794 08.)

To Margaret I. Nisbet, the sum of eight thousand two hundred and seventy-two dollars and sixty cents, ($8,272 60.)

To Jared F. Harrison, the sum of fourteen thousand five hundred and twenty-two dollars and forty-eight cents, ($14,522 48.)

To Frederick A. Foster, the sum of eight thousand eight hundred and ninety-eight dollars, ($9,898.)

To J. Bardwell, the sum of six thousand seven hundred and eighteen dollars, ($6,718.)

To H. S. McComb, the sum of nine hundred and ninety-three dollars.

That from said fund, so apportioned and set apart to each of said parties, the said receiver shall first pay to said party, his representatives, or assigns, in full, (so far as the fund so set apart to him will go,) the amount of his claim now matured and due, (the maturity of the claims of the original parties in said cause to be ascertained from the master's report herein,) together with any additional amount which shall have matured and become due at the time of such payment, in the following order, viz:

He shall first pay in full, or so far as such fund will go, any judgment or judgments of such party, if any, out of the remainder of such money, if any; he shall next pay in full, or so far as such money will go, any and all coupons which are due on the bonds held by such party; and out of the remainder of such moneys, if any, he shall next pay in full, or so far as such fund will go, the principal of any bond or bonds which are matured and due; and in case the amount of such matured bonds exceed the sum so applicable to their payment, then he shall pay in full such part of said bonds as said sum shall be sufficient to pay; and the remainder of the fund so apportioned and set apart to each of said parties shall in like manner be applied, from time to time, by said receiver, to the

payment of such party of the amounts which shall thereafter become due and remain unpaid for either interest or principal on his or her respective claims, as and when the same shall fall due; and the said receiver shall apply the said remainder of said sum so set apart and appropriated, to any of said parties who shall consent to receive the same in payment and satisfaction, so far as the same will go, of the principal sum or sums secured to be paid by guarantied bonds held by them respectively, though not yet matured, they rebating all future interest thereon to the extent of such payments; that before such payments are made, each of said parties shall produce and deliver to the receiver a written statement, certified by the clerk of the court to be correct, of the parties, date, and of the amount of such judgment of which he claims payment, and shall produce and deliver to the receiver all coupons and bonds which are due and which may be paid in full, together with a receipt for such payment, and shall deliver to him a receipt stating the amount which is paid on any judgment, bond, or coupon which may be paid only in part, describing the same so that it may be identified; and in case of partial payment, when made, the receiver shall indorse upon the bond a statement of the amount so paid by him, and that the same was paid from funds in his hands as receiver; and all bonds and coupons shall be produced to him for such indorsement before such payment shall be made thereon, and the receiver shall file with the clerk of the court in which the judgment so paid in part is entered a statement of the amount so paid thereon, and that the same was paid from funds in his hands as receiver, which statement shall by said clerk be filed and preserved among the papers in the cause.

And it is further adjudged and decreed, that after the said distribution the said receiver shall proceed to collect from the principal debtors in said judgments on guarantied bonds and coupons, and such bonds and coupons not in judgment, as shall have been delivered to him in accordance with the provisions of this decree, the full amount of such debt as against such principals and each of them, and shall at each term of this court report to the court the amount of moneys in his hands so collected, and shall hold the same subject to further distribution, under the order of the court, to the creditors of the Mississippi and Missouri Railroad Company, and of the surplus thereof, if any remain after the payment of the creditors, to the stockholders of said Mississippi and Missouri Railroad Company.

And it is further ordered, adjudged, and decreed, that the

shareholders of the Mississippi and Missouri Railroad Company who would be entitled to the distribution of said fund according between the stockholders and bondholders of the Mississippi to the agreement of Nov. 1, 1865, and subsequent agreements and Missouri Railroad Company and the said Stanton, Elliott, and Wilson, and who would have been entitled to said fund, but for the claims of the creditors of the Mississippi and Missouri Railroad Company, be and they are hereby abrogated, subject to the foregoing provisions of this decree, to all the rights, claims, and remedies of the parties plaintiff respectively, in and upon each and all of said judgments, coupons, and bonds, as and when the same shall be so paid in full, against the municipal corporations which are the principal debtors on such bonds and judgments; that such judgments shall remain in full force and effect against such corporations for the benefit of said shareholders, who may enforce the collection of the same in the name of the plaintiffs therein, or otherwise, but at their own costs and charges, by any process, remedy, or proceeding which said plaintiffs might have had for their own benefit; that any and all proceedings which might have been instituted by any of said parties for the collection of said demands shall remain and inure to the benefit of the receiver herein for the use of the parties entitled to this fund, and to this end the original and intervening complainants, respectively, on the payment of such judgments by the receiver, shall execute, acknowledge, and deliver to him an assignment of each judgment so paid, and the receiver shall, on the payment of the several demands herein ordered to be paid to the complainants and intervenors and the said Foster, Bardwell, and McComb, deliver, under the order of the court, to said shareholders, or to their lawfully constituted and authorized trustees or agents, such assignments of said judgments, and shall also deliver to them all coupons and bonds which shall have been paid in full as above directed.

And it is further ordered, adjudged, and decreed, that if, after payment in full to any of said parties by said receiver of all sums which said party shall be entitled to have paid to him out of said funds, according to the directions hereinbefore given, there shall remain in said receiver's hands any portion or residue of the proportion of said funds set apart and apportioned to said party, as hereinbefore directed, the same shall be reported by said receiver to the court, and held subject to such further order and direction as may be made by the court in respect to the disposition thereof.

It is ordered, adjudged, and decreed that the receiver do

proceed to distribute, according to the terms of this decree, the funds now in his hands, as follows: He shall as soon as practicable notify each of the parties entitled to share in the distribution of said fund of the amount of his or her dividend of the same, and of the amount of money in his hands applicable to the payment of the same; the party entitled thereto may elect to take payment of the balance thereof of the bonds of the Chicago, Rock Island, and Pacific Railroad Company, constituting a portion of the fund in the hands of the receiver, at the market price of said bonds at the stock exchange in the city of New York, on a day to be fixed by the receiver, with the approval of a judge of this court, and with reference to the best interests of all the parties concerned; and if there shall not be sufficient money in the hands of the receiver to pay all of said dividends, and all the parties entitled thereto shall not elect to receive bonds for the balance as above provided, the receiver shall proceed to realize the sum necessary to pay said dividend by converting enough of said bonds held by him into money, by the sale thereof at public sale, at the stock exchange in the city of New York, at not less than the current market price of said bonds at said stock exchange, at such time as said receiver may think proper for the best interests of the parties concerned; but before any such sale the said receiver must notify the parties, their agents, or attorneys, of the time of such sale, and of the amount to be put in the market at any one time, and shall also give five days' public notice of said sale in a daily paper published in the city of New York; provided that no repetition herein contained of the matters adjudicated in the said original decree shall be taken or construed as a readjudication thereof as between the parties to said original decree; which said decree is to be regarded as continuing in full force and virtue, except so far as modified hereby as to provide for the payment of the claims of the said Foster, Bardwell, and McComb, equally with the original complainants and intervenors, and all the full amount of their respective claims as hereinbefore provided.

And thereupon the complainants in said consolidated bill, John V. McCollum, Frederick A. Foster, J. Bardwell, and H. S. McComb, and the defendant, the Chicago, Rock Island, and Pacific Railroad Company, by their several solicitors, each pray an appeal from this decree to the Supreme Court of the United States, and it is allowed them or either or any of them on their giving bonds with sureties in the penal sum of $500 as provided by law for the costs of the appeal; provided that

in order to supersede and stay execution of said decree pending such appeal, one or more of the appellants shall give bond with sureties conditioned and to be approved as provided by law, in the penal sum of $700,000.

And the said Mark Howard, John Weber, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Joseph W. Clark, Volkert P. Dow, Christopher T. Lansing, Margaret I. Nisbet, and Jared F. Harrison pray an appeal to the Supreme Court of the United States from so much of said decree as awards any part of the fund in controversy to said Frederick A. Foster, J. Bardwell, and H. S. McComb, and it is allowed them on their giving bond as provided by law in the sum of $500.

And the said George W. Stanton, Jr., John Elliott, and Blakely Willson, pray an appeal from so much of said decree as awards any part of said fund to said Foster, Bardwell, and McComb, and also from so much of said decree that provides that the said receiver shall proceed to collect the bonds, cupons, and judgments which are to be delivered and assigned to him by the complainants and intervening creditors, and hold the same subject to such further distribution under the order of the court to the creditors of the Mississippi and Missouri Railroad Company, and their appeal is allowed on their giving bond, as provided by law, in the penal sum of $500.

J. M. LOVE, *Judge, &c.*

And afterwards, to wit, on the 13th day of November, A. D. 1869, and during the October term of said court, came the complainants in said consolidated bill, and presented in open court an appeal and supersedeas bond, which is in the words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES DISTRICT OF IOWA.

MARK HOWARD *et al.*, *vs.* THE CITY OF DAVENPORT, *et al.*	No. 69 chancery.—Original bill.
AND	
FREDERICK A. FOSTER, *et al.*, *vs.* MARK HOWARD, AND OTHERS, complainants and defendants, in said original bill.	Consolidated cross-bill.

Know all men by these presents that we, John V. McCollum, Frederick F. Foster, J. Bardwell, and H. S. McComb, as

principals, and John McWilliams, F. R. West, Hoyt Sherman, P. M. Casady, William Pritchard, J. C. Savery, F. M. Mills, George C. Tichenor, R. T. Wellslager, Wesley Redhead, George L. Davenport, George A. Davenport, B. F. Murphy, Samuel M. Nickerson, and Daniel Thompson, as sureties, are held and firmly bound unto Mark Howard, John Weber, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracey, Harriet Le Conte, Margaret I. Nisbet, Joseph W. Clark, Volkert P. Dow, Christopher T. Lansing, Jared F. Harrison, and the Mississippi and Missouri Railroad Company, and the Rock Island and Pacific Railroad Company, in the sum of $700,000, to be paid to the said parties, their executors and administrators; to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 11th day of November, A. D. 1869.

Whereas the above-named John V. McCollum, Frederick A. Foster, J. Bardwell, and H. S. McComb, have each taken an appeal to the Supreme Court of the United States, from said circuit court of the United States for the said district of Iowa, to reverse the decree rendered and entered by said court, on the 8th day of November, 1869, in the above-entitled cause:

Now, therefore, the condition of this obligation is such, that if the above-named John V. McCollum, Frederick A. Foster, J. Bardwell, and H. S. McComb shall prosecute their appeal to effect, and answer all costs and damages, if they shall not make good their pleas, and shall in all things abide the decree of the Supreme Court of the United States on the hearing of their appeals, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

JOHN V. MCCOLLUM, [L. S.]
By his att'y of record, SAM. W. FULLER, [L. S.]
FREDEBICK A. FOSTER, [L. S.]
By his att'ys of record, WITHROW & WRIGHT, [L. S.]
H. S. MCCOMB, [L. S.]
By NOURSE & KAUFMANN,
His Attorneys of Record.
J. BARDWELL, [L. S.]
By POLK, HUBELL & BANCROFT,
Attorneys of Record.
JOHN MCWILLIAMS. [L. S.]

F. R. West.	[L. S.]
Hoyt Sherman.	[L. S.]
P. M. Casady.	[L. S.]
Wm. S. Pritchard.	[L. S.]
J. C. Savery.	[L. S.]
F. M. Mills.	[L. S.]
Geo. C. Tichenor.	[L. S.]
R. T. Wellslager.	[L. S.]
Wesley Redhead.	[L. S.]
Geo. L. Davenport.	[L. S.]
Geo. A. Davenport.	[L. S.]
B. F. Murphy.	[L. S.]
Samuel M. Nickerson.	[L. S.]
Daniel Thompson.	[L. S.]

The above bond is approved as to the form thereof, and also as to sufficiency of the sureties for the penalty of the same.

November, 12, 1869. J. M. Love, *Judge, &c.*

Endorsed: Filed November 13, 1869.

Geo. B. Corkhill, *Clerk.*

And these respondents, further answering, say, that the said Foster, McCollum, Bardwell, and McComb perfected an appeal from the said decree to this honorable court, by giving a *supersedeas* bond, as required by said decree, and duly filed a transcript of the record in said cause in this court, on the 21st day of December, 1869, where the said cause is now pending as the case of John V. McCollum *et al. vs.* Mark Howard *et al.*, No. 406, of the present term. To which transcript the respondents crave leave, for greater certainty, to refer, and a copy whereof is herewith filed, marked exhibit "B," of this return, as a part thereof.

And these respondents say, that said last-mentioned suit was founded upon the same identical claims set out in the petition filed by said McCollum, Bardwell, McComb, and Foster, and that they claimed in and by their said bill of complaint the same rights and relief which they had claimed in their petitions.

And these respondents, further answering, say, that after the entry of the last mentioned decree, and after the appeal

thereform had been ~~forfeited,~~ forfeited to wit, on the 8th day of November, A. D. 1869, the said Mark Howard *et al.*, and the other original intervening creditors in said cause, made in said circuit court for the district of Iowa a motion, and upon consideration of said motion the said circuit court entered an order in said cause, which motion and order appear on page 139 of the transcript of the record, in case No. 406, and are in substance as follows:

And afterwards, to wit, on the 8th day of November, A. D. 1869, and during the October term of said court, came the defendants to said consolidated bill, by their solicitors, Grant & Rogers, and filed in said clerk's office a motion, which motion is in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF IOWA.

MARK HOWARD *et als.*
against
THE CITY OF DAVENPORT *et als.*
} No. 69, equity.—October term, 1869.

Now come the complainants and intervening creditors joining with them herein, and move the court for a rule or order on the receiver herein, that he proceed to execute the decree rendered herein by the distribution of the fund in his hands, as provided by said decree, notwithstanding any appeal taken herein by Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, or any of them; or in case the court should be of opinion that said motion cannot be granted in full, that then said receiver be ordered to proceed to execute said decree, except as to such portion of said fund as to which the execution of said decree was suspended by order of the court, made at the May term, 1869.

JAMES GRANT and J. N. ROGERS,
Solicitors for Claimants and others.

Endorsed: Filed November 8, 1869.
GEORGE B. CORKHILL, *Clerk.*

And afterwards, to wit, on the 12th day of November, A. D. 1869, and during the said October term of said court, there was entered of record in said cause an order in the words and figures following:

MARK HOWARD *et al.*
vs.
THE CITY OF DAVENPORT *et al.*
} No. 69, equity.

Now come the complainants and intervening creditors joining with them herein, and move the court for a rule or order

on the receiver herein, that he proceed to execute the decree rendered herein by the distribution of the fund in his hands as provided by said decree, notwithstanding any appeal taken herein by Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, or any of them; or in case the court should be of opinion that said motion cannot be granted in full, that said receiver be ordered to proceed to execute said decree, except as to such portion of said fund as to which the execution of said decree was suspended by the order of the court, made at the May term, 1869.

And the court having heard the same, and being now sufficiently advised in the premises, is of the opinion that the foregoing motion, owing to the supersedeas bond heretofore filed, cannot be allowed. It is therefore ordered and adjudged by the court that the same be overruled.

And these respondents, further answering, say, that the petition originally filed in this cause by the relators, and of which a copy was served on these respondents, contains the following statement and prayer for relief, to wit:

That relators have no remedy therefor except a writ of mandamus from this court, to be directed to the judges of said circuit court, commanding them to proceed to execute said decree. Wherefore they pray that such writ may issue, commanding the said judges forthwith to proceed, notwithstanding said proceedings subsequent to said original decree, to carry the same forthwith into execution in manner and form as therein and thereby decreed; or, if the court shall be of opinion that relators are not entitled to have said decree forthwith executed, as to the whole funds in the receiver's hands, that then the writ may issue, commanding said judges to execute the same as to all of said fund, except so much as will be sufficient to satisfy the claims of said Foster, McCollum, Bardwell, and McComb, if finally allowed in full, or commanding said judges to do whatsoever in the opinion of this court said relators may be entitled to have done for their relief in the premises.

JAMES GRANT,
JOHN N. ROGERS,
Attorneys for Informant—

as will more fully appear by reference to said petition now on file in this cause; and they further say that the alternative writ awarded by this honorable court, and served on these respondents, after amendment, by leave of this court, is as follows:

THE UNITED STATES OF AMERICA.

The President of the United States of America to the honorable the judges of the circuit court of the United States for the District of Iowa, greeting:

Whereas Mark Howard, John Weber, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Joseph W. Clark, Volkert P. Dow, Christopher Y. Lansing, Margaret S. Nisbet, and Jared F. Harrison, George W. Stanton, Jr., J. Elliott, Blakely Wilson, and the Mississippi and Missouri Railroad Company, by Grant, the irattorney, has caused this court to be informed, that on the 9th day of July, 1866, the said Mark Howard and John Weber filed their bill in equity in the circuit court of the United States for the district of Iowa, alleging that they had severally recovered judgments against the city of Davenport, and the Mississippi and Missouri Railroad Company, for the sums of $4,404 10 and $10,002 59, for interest on certain bonds executed by the city of Davenport; to aid in the construction of the Mississippi and Missouri railroad; which bonds were guarantied by the Mississippi and Missouri Railroad Company, and suit was commenced against the city of Davenport, the Mississippi and Missouri Railroad Company, George W. Stanton, Jr., John Elliott, and Blakely Wilson, the Chicago and Rock Island, and the Chicago, Rock Island, and Pacific Railroad Company; and afterwards such proceedings were had that Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey D. Tracy, Harriet Le Conte, Joseph Clark, Volkert P. Dow, Margaret S. Nisbet, and Jared F. Harrison, holders and claimants of certain other bonds, executed by Scott county, Muscatine city and county, Johnson county and Iowa city, which were guarantied by said Mississippi and Missouri Railroad Company, were allowed to, and did, join with said Howard and Weber in the prosecution of said suit. And the said plaintiffs alleged in substance, that at a meeting of the stock and bondholders of the Mississippi and Missouri Railroad Company, held in New York on the 20th of October, 1865, it was resolved to sell the Mississippi and Missouri railroad, its franchises, and all its real and personal property, to the Chicago and Rock Island Railroad Company, for the sum of five and a half millions of dollars, provided the same was distributed among the mort-

gage bondholders and stockholders of said Mississippi and Missouri Railroad Company, according to the following scale:

First mortgage, eastern division, par and interest to 1st July, 1865,		$1,256,490
Second mortgage, " "	$400,000 at 80	320,000
Oskaloosa division	665,939 at 62½	416,212
Land grant division bonds	3,878,550 at 70	2,710,635
Second construction mortgage bonds	693,764 at 30	208,129
Capital stock	3,452,500 at 16	552,400
Expenses foreclosure		32,194
		$5,500,000

And George W. Stanton, jr., John Elliott, and Blakely Wilson were appointed a committee or trustees, for the stock and bondholders, to arrange the terms and manner of sale, and select some trust company to receive the bonds and stock of the assenting parties, and give them certificates of what they were entitled to receive. That on the 1st of November, 1865, the said Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company, entered into a contract in writing to carry out the sale of the former company's road, according to the resolutions of the 20th of October, 1865, to the Chicago and Rock Island Railroad Company; by which agreement the Mississippi and Missouri railroad corporation were to cause the outstanding mortgages on its property to be foreclosed, and the said property to be sold under the foreclosure decree, so as to convey a clear title to such corporation in Iowa, as the Chicago and Rock Island Railroad Company might designate, and the five and a half millions purchase money were to be paid in bonds of said company, guarantied by the Chicago and Rock Island Railroad Company, or a consolidated company made of the two. That the mortgages were foreclosed and a decree rendered in May, 1866, and the whole property was sold, under said decree, in separate parcels, on 9th July, 1866, to the Chicago, Rock Island, and Pacific Railroad Company, for sums amounting in the aggregate to $2,100,000, and said company was consolidated with the Chicago and Rock Island railroad, and proceeded to execute said contract of 1st November, 1865. The plaintiffs, Howard, *et als.*, claimed that the said Mississippi and Missouri Railroad Company were insolvent, and before the sum of $552,000, set apart by the terms of the sale, could be divided among the stockolders, it should be divided among them, Howard and others, as holders of the said guarantied bonds and judgments thereon. The said Mississippi and Missouri Railroad Company, and the trustees of the stock and bondholders, who assented to said sale, Stan

ton, Elliott, and Wilson, the Chicago and Rock Island railroad, and the Chicago, Rock Island, and Pacific railroad, the new company created in Iowa, and consolidated with the Chicago and Rock Island railroad, were made parties defendant. The trustees, Stanton, Elliott, and Wilson, answered and made defence. The Chicago, Rock Island, and Pacific Railroad Company answered, alleging that they had become agents to distribute the fund, and made no defence, and demanded to be protected by the decree of the court. Such proceedings were afterwards had, that at the May term, 1868, of the said circuit court, a decree was rendered, that said plaintiffs were general creditors of said Mississippi and Missouri Railroad Company, and their claims, amounting to $832,032 38, were to be paid *pro rata* out of the $532,000, which was to be divided among the assenting stockholders, and the stockholders or their agents were subrogated to the creditors' rights on the guarantied bonds. From this decree an appeal was taken by defendants and duly prosecuted in this court at the December term, 1868, and the decree of the said circuit court was affirmed; and a mandate issued from this court to the Iowa circuit court, commanding the said court to execute said decree so affirmed; all of which, by reference to the record and proceedings of this court in the said cause, Number 319, of the said December term, 1868, will more fully appear. And the said relators give this court further to understand and be informed, that pending said appeal to this court, and prior to the determination thereof, and the fund in controversy having been paid over to the receiver, in said decree mentioned in pursuance of said decree, and being in his hands, as appears by his report, on file in the cause, at the October term, 1868, of said circuit court, one Frederic A. Foster filed his petition in said court, entitled in the said cause, claiming to be the holder of certain of the bonds of the said Mississippi and Missouri Railroad Company to the amount of $10,000 and accrued interest, being part of the bonds secured by the first mortgage on the western division of the railroad of said company, and certain lands granted to it in aid of its construction, commonly known as "1st Mortgage Land Grant Bonds;" which bonds had not assented to the said contract or agreement for the sale of the railroad as aforesaid, and claiming to be entitled to a lien on the said fund superior to the said Howard and others, complainants, and to have the said bonds paid in full, out of said fund, in preference to said complainants. That afterwards, to wit, at the May term, 1869, of said circuit court, said appeal having been determined, and

the mandate from this court filed in said circuit court, and the complainants having moved said court to carry the decree into execution, certain other parties, to wit: John V. McCollum, J. Bardwell, and H. S. McComb, appealed for leave to file their several petitions therein; also claiming severally to be holders of certain unassented mortgage bonds of the said Mississippi and Missouri Railroad Company, and to be entitled to have the same paid out of the said fund, prior and paramount to any payment to the complainants, as directed by said decree. And thereupon at the said term last mentioned an order was made by the said circuit court, of which a certified copy is annexed to said information, marked "A," and made part hereof. That thereupon, at the same term, said Foster, McCollum, Bardwell, and McComb prayed an appeal to this court from so much of said order as denied their petition for a suspension of the distribution of the whole of said fund, and as directed distribution of a part thereof; which appeal, together with the supersedeas thereon, of any distribution of said fund, was by the said court allowed, against the objection and remonstrance of said complainants, and said order of the May term, 1869, so far as it directs distribution to be made, remains in consequence wholly unexecuted. That afterwards, to wit, on the last July rule day of said circuit court, said Foster, McCollum, Bardwell, and McComb filed their consolidated cross bill in pursuance of said order. That relators answered said cross bill, and the same was heard at the October term, 1869, and decree made, dismissing said bill as to McCollum, adjudging that said Foster, Bardwell, and McComb were entitled to share in the fund *pro rata*, on the same footing and equally with the original claimants, to wit, as general creditors of the Mississippi and Missouri Railroad Company and not otherwise, and ascertaining the amount due to them respectively, and on which dividends should be made to them, *pari passu* with the original complainants, as follows, to wit:

To said Foster the sum of	$9,898 00
To said Bardwell the sum of	6,718 00
To said McComb the sum of	393 00

And so far modifying the original decree, as to let in said parties to participate in the benefit thereof, to said extent, and no further: A copy of said decree, marked "D," is annexed to said information, and made part thereof. That said Foster, Bardwell, McCollum, and McComb thereupon appealed from said decree to this court, and obtained a supersedeas

thereon. That afterwards, to wit, at the said October term, your relators moved the said circuit court for a rule or order on the receiver in said cause, to proceed, notwithstanding an appeal of said Foster and others, to make distribution of the fund in his hands, under the original decree, or of so much thereof as was ordered by the court by the said order of the May term, 1869, to be distributed, which motion was by the said court over-ruled. That by reason of said actings and doings of said circuit court, subsequent to the rendition of the original decree, affirmed by this court, relators have hitherto been and are still deprived of all benefit from said decree and prevented from enforcing the same, or obtaining peyment of their said claims thereunder. That said actings and doings of the circuit court are, as relators are advised and believe, wholly contrary to, and unwarranted by, law or equity. That relators have no remedy therefor except a writ of mandamus from this court to be directed to the judges of said circuit court, commanding them to proceed to execute said decree.

Now, we being willing that full and speedy justice should be done in the premises, do command you, that you, and each of you, proceed forthwith, notwithstanding said proceedings subsequent to said original decree, to execute the said original decree in the case of Howard, and others, Davenport, and others, in manner and form as therein decreed and affirmed by our said Supreme Court, by causing the said bonds and money, and proceeds of said bonds, to be delivered to said plaintiff, in manner and form as in said affirmed decree adjudged, the costs to be paid as in said decree ordered, and that you cause to be delivered to the lawfully constituted and authorized trustee or agents of the shareholders of the Mississippi and Missouri Railroad Company, the judgments, coupons, and bonds to which they were subrogated by said decree, in manner and form as therein provided, or that you appear before our said Supreme Court of the United States now in session, at Washington, on the first Monday in February, 1870, and show cause why you refuse to do so.

Witness the honorable Salmon P. Chase, chief justice of our said Supreme Court, and the seal thereof, at Washington, this the twentieth day of December, A. D. 1870.

D. W. MIDDLETON, *Clerk*.

And these respondents submit to this honorable court whether, in and by the said alternative writ, the relators have stated and shown such a case as in law entitles them to the relief and the order therein prayed.

And these respondents, further answering, say, that they had no intention or purpose to disobey or evade the order or mandate of this court, made in the original cause of Howard *et als.*, *vs.* The City of Davenport *et al.*, at the December term, A. D. 1868; but they believed that the said Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb had a legal right to present and prosecute in said circuit court of the United States for the district of Iowa their several and respective claims upon the funds then in the hands of the receiver appointed in said cause by said circuit court, and that it was the duty of these respondents to allow said Foster, McCollum, Bardwell, and McComb to file their said petitions and consolidated bill in said cause, and prosetute the same to a final hearing, in the manner hereinbefore set out; and that upon the final hearing of said cause the said parties were respectively entitled to the relief granted them by the decree entered in said cause at the October term, A. D. 1869, of said circuit court; and further, that said Foster, McCollum, Bardwell, and McComb were entitled to pray, have allowed, and prosecuted their appeals from the decrees of said circuit court to this honorable court, in the manner hereinbefore set out; wherefore these respondents pray the judgment of the court, whether the said proceedings allowed and had in said circuit court of the United States for the district of Iowa, on behalf of said Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, which have been hereinbefore fully set out and shown here to the court were legally and properly had and allowed; and these respondents pray that this honorable court will make such order in the premises as shall be required by right and justice, and that these respondents may be at once dismissed with their costs.

SAMUEL F. MILLER,
One of the Justices of the Supreme Court of the United States assigned to hold the Circuit Court in the District of Iowa.

JOHN F. DILLON,
Judge of the Circuit Court of the United States for the District of Iowa.

J. M. LOVE,
Judge of the District Court of the United States for the District of Iowa.

THOMAS F. WITHROW,
SAMUEL W. FULLER,
Counsel for Respondents.

Supreme Court of the United States.

DECEMBER TERM, 1869.

Ex parte. MARK HOWARD and OTHERS	11. Motion for a *mandamus* or *procedendo* to the judges of the circuit court for the district of Iowa.
JOHN V. MCCOLLUM, FOSTER, BARDWELL, and MCCOMB, appellants *vs.* MARK HOWARD and OTHERS appellees.	344. Appeal from circuit court for the district of Iowa.
JOHN V. MCCOLLUM, FOSTER, BARDWELL, and MCCOMB, and CHICAGO, ROCK ISLAND, and PACIFIC RAILROAD COMPANY, appellants, *vs.* MARK HOWARD and OTHERS, appellees.	406. From the circuit court for the district of Iowa.

ARGUMENT IN BEHALF OF HOWARD AND OTHERS, RELATORS AND APPELLEES.

CASE.

In the *mandamus* cause, the respondents set out and refer to the whole record in each appeal cause, 344 and 406, and then refer to such particular parts thereof as they think make a sufficient return to the writ; they thus properly bring before this court the whole record, and as the first and second record

are treated, by agreement (page 142 of record 406) as one, we feel authorized to state and argue both the *mandamus* and second appeal together.

The Mississippi and Missouri Railroad Company, a corporation created by the laws of Iowa in 1854, to construct a railroad from Davenport to Council Bluffs, with a branch called the Oskaloosa division, from 1854 to 1861, executed five mortgages on its property.

First trust mortgage on first division, Davenport to Iowa City, for...	$1,000,000
Second trust mortgage on first division Davenport to Iowa City, for	400,000
Third trust mortgage on Oskaloosa division for.....	590,000
Fourth trust mortgage on second division, Iowa City to C. B., and land grant called first grant division mortgage.....	3,612,000
Fifth trust, second land grant construction mortgage on whole road,	691,000

These various mortgages, or deeds of trust, conveyed the property to certain trustees, who, upon default of payment of interest on the bonds named in the mortgages, were authorized to take possession of the property and foreclose the respective mortgages.

In the year 1865, after the corporation had constructed two hundred and twenty-seven miles of road, including the Oskaloosa branch, they became embarrassed and insolvent. During the progress of construction, the company had received in payment for subscriptions of stock the bonds of certain cities and counties, which the corporation had guarantied and indorsed to increase their value.

On 20th October, 1865, after default on the 1st of July previous to pay the interest on their own mortgage bonds, at a meeting of the stock and bondholders in New York, it was resolved to sell out the entire property of the corporation to the Chicago and Rock Island Railroad Company, an Illinois corporation connecting with it at Rock Island, for $5,500,000, and to divide the proceeds according to the following scaled rate:

First mortgage, eastern division, par and interest to July, 1865.....	$1,256,490
Second mortgage, eastern division, $400,000, at 80.....	300,000
Third mortgage, Oskaloosa division, $665,939, at 62½.....	416,212
Fourth mortgage land grant, 1st construction, $3,878,550, at 70½.....	2,710,635
Fifth mortgage 2d land grant construction, $693,764, at 30.....	208,129
Capital stock, $3,452,764, at 16.....	552,400
Expenses of foreclosure.....	32,194
	$5,500,000

At this meeting George W. Stanton, Jr., John Elliott, and Blakely Wilson, were appointed a committee, or trustees, for both the stock and bondholders, to arrange with the Chicago and Rock Island Railroad Company the terms and manner of sale, and select some trust company to receive the bonds and stock of the assenting parties, and give them certificates of what they were entitled to receive. On the 1st of November, 1865, the Mississippi and Missouri Company and the Chicago and Rock Island Railroad Company entered into a contract in writing to carry out the sale of the former company's road, according to the resolutions of the 20th October, 1865, by which agreement the Mississippi and Missouri Company were to cause the outstanding mortgages on its property to be foreclosed, and the property to be sold under the foreclosure decree, so as to convey a clear title to such corporation in Iowa as the Chicago and Rock Island Railroad Company might appoint, and the five and a-half millions of dollars purchase-money was to be paid in the bonds of the new Iowa Company guarantied by the Chicago and Rock Island Company, or of a consolidated company made of the two. The Iowa Company was created, called the Chicago, Rock Island, and Pacific Railroad Company, and the consolidation afterwards effected. Nearly all the stock and bondholders ratified this sale, and agreed to receive their *pro rata* share, by an agreement called the Peter Myers agreement. These mortgages were all foreclosed at the May term, 1866, and the mortgaged property sold by a master in separate parcels on the 9th of July, 1866. The property, under the first and second mortgages, sold for $1,000,000, Oskaloosa division $300,000; first land grant construction $800,000; and there was nothing for the last mortgage. It was all sold direct to the Chicago, Rock Island, and Pacific Railroad Company, and the trustees of the various mortgages receipted to the master for the several amounts to which they were entitled.

No provision was made in these negotiations for the guarantied debt of the city and county bonds. In 1864, Mark Howard and John Weber had recovered judgments against the city of Davenport, issued execution, and had return of *nulla*

bona. On the 9th of July, 1866, Howard and Weber filed their bill in equity in the circuit court for the district of Iowa, setting out these facts, and claiming that, before the sixteen per cent. was paid to the stockholders, their claims as general creditors of the corporation should be paid, and asking a decree for that purpose. The bill was filed by themselves alone; by their consent the other plaintiffs were admitted during the progress of the cause. The Mississippi and Missouri Company, (Stanton, Elliott and Wilson, trustees of the stock and bondholders,) the Chicago and Rock Island, and the Chicago, Rock Island, and Pacific Railroad Company, were made parties defendants. The Mississippi and Missouri made default; the trustees, Stanton and Elliott answered and made defence; and the Chicago, Rock Island, and Pacific Company answered, admitted the contract, said they were ready to perform it; that the said company had, by contract with Stanton, Elliott and Wilson, assumed the performance of their duties, and that they did not file an answer for the purpose of making further defence, but to protect itself in the position it occupied, and prayed that in any decree the court might make they might be protected. All the papers and proceedings in relation to this part of the case are in the record, case 344, pages 2, 18, 22, 24, 25, 36, 39, 42, 45—the Peter Myers agreement—and can be readily referred to by the index, which is very complete. Indeed, no special reference will be made to the record of that case, unless where the fact referred to is in the evidence of some witness. In the final decree which was made by the court in that cause, (record of decree, case 344, page 109,) the court allowed a deficiency of $100,618 of the fund, because of over-payments by the Chicago and Rock Island Company, and deducted from the claim of the plaintiffs, as the stockholders' share thereof, $10,793, by reason of an account filed by the Chicago and Rock Island Company, in case 344, page 63, E. Cook's deposition, alleging that said company had paid all the bonds of all classes of Mississippi and Missouri Company, and thereby they ought to reduce the amount to go to the plaintiffs, in round numbers, from $552,000 to $451,000. This statement was used to deceive

the court, and was not true. E. Cook so admits, and excuses it in his affidavit, case 406, page 131.

The court below, in the case of Howard and others, rendered a decree in their favor, in May, 1868; the defendants, Stanton, Elliott, and Wilson, and the Chicago, Rock Island, and Pacific Railroad Company, appealed, (case 344, p. 115.) They did not file a supersedeas bond, but only a cost bond. Allen, the receiver appointed by the court, was required to execute the decree. On the 22d July, a demand of the fund was made and refused; an attachment was asked for; the Chicago and Rock Island Company using, as it afterwards appears, the name of the trustees, Stanton and others, refused to execute the decree, first, because of certain proceedings of Maxwell and others in the New York courts. On affidavit that the claims of Maxwell and others were included in the suit of Howard, the claim of Frederick Foster was set up in the New York courts, and he is at this stage of the proceedings introduced into this cause. It appears that John F. Tracy was president, David Dows and Ebenezer Cook directors, of the Chicago and Rock Island, and Chicago, Rock Island, and Pacific Railroad Company; Francis Torr was part of the time secretary, and on his resignation Ebenezer Cook was appointed secretary. While this application to execute the decree of Howard and others was being urged in the court below, David Dows, director in the Chicago, Rock Island, and Pacific Company, meets Frederick Foster in the streets of New York, and advises him to buy, of a party to Foster unknown, whom he never saw, $10,000 of Mississippi and Missouri company's first land grant bonds, then not worth over fifty per cent., foreclosed in the courts of Iowa for default of interest, on which there was only a dividend of twenty per cent. (see foreclosure decree, case 344, p. 45) for their par value and interest; and Foster, without a word of inquiry, on the 29th of July, 1868, pays to the owner, whom he does not know, but who proves to be Henry S. McComb, one of the plaintiffs, the par value and interest, knowing that he must bring a suit before he gets his money. (See Foster's deposition, case 406, page 115.)

On the 31st of July, 1868, these bonds were used in the New York courts against the Chicago, Rock Island, and Pacific Company, and Stanton, Elliott, and Wilson.

They were used to prevent and tie up the execution of the decree, until the October term, 1868. On the 27th of October, 1868, Frederick Foster filed his petition on these bonds in Howard's suit; he sets up the contract of October, 1865, and says he was no party to it; he sets out in full the foreclosure proceedings, and decree of foreclosure and sale under his mortgage; he does not set out for what sum the property sold under his mortgage; he does not make his trustees parties, or charge them with any default, or any detention of his money, or any fraud in obtaining their decree or sale; but he claims, that the $550,000 to go to the stockholders out of the $5,500,000, private sale, which required a foreclosure to perfect title, was a portion of the proceeds of the sale of the mortgaged property; he does not charge it to be a part of the foreclosure sale; how could he, when the record showed that the property under his mortgage brought $800,000, and the money was in the hands of his trustees. (See record, case 344, p. 245.)

He gravely asks the court to suspend the execution of the Howard decree, though there was no supersedeas bond; asks the court to suspend the execution of the decree until the hearing in this court, or that the court will cause the plaintiffs to join issue with him as to the right to the fund decreed to plaintiff. (See case 344, pp. 129, 131, 132.)

On this petition, without security, the court below, (case 344, p. 248,) on 29th October, gave Foster leave to file it, and suspended the execution of the decree until the decision of the cause here. We think the managers of this cause of Foster are justly entitled to the discovery of a new way to prevent the execution of a final judgment, without either appeal or security.

The cause of Howard was submitted to the court in December, 1868; affirmed in February, 1869; the mandate, in the usual form sent down, and presented to the court below on the 11th of May, 1869, (case 344, p. 256,) and a motion made to

execute the affirmed judgment on 26th of May 1869, and overruled, (case 344, p. 266.) On the same day, John V. McCollum, John Bardwell, Henry S. McComb, and Frederick Foster, were allowed to file a consolidated petition, setting up more specifically their claims in petitions already filed, but no other claims; that the receiver set apart $200,000 to meet their claims and distribute the balance; all this without security for delay of our $200,000. From this order Foster, McCollum, Bardwell, and McComb appealed, and gave the requisite security.

On the 5th day of July, 1859, McCollum and others filed their consolidated bill, setting forth their claims under the mortgages; all of them were under the fourth or first land grant mortgages, entitled to seventy per cent. on the scale price, except one of Bardwell's and one of McComb's, and a scrip for interest, making $1,700. McCollum also claims eight hundred coupons of bonds which had been paid, of which two hundred had never been signed, and to which we shall refer again. They set forth in this bill the foreclosure and sale, and the aggregate amount of $2,100,000, but they did not say for what their mortgaged property sold, nor to what part they were entitled. They did not attach fraud or neglect in their trustees. They did not make them parties. They did not say what part of the $5,500,000 was for their share under this mortgage, but that the amount bid was nominal, and the real amount was for $5,500,000; alleged the trustees had never received the money, but all the disbursements had been made by the Chicago, Rock Island, and Pacific Railroad Company. That they should be first paid out of the fund in court, or if not, that they might come in as general creditors, and divide the fund with Howard and others. (See case 406, p. 1.)

This bill was answered by all the plaintiffs and all the defendants in the Howard suit, except the Chicago, Rock Island, and Pacific Company. All the plaintiffs' equities were denied. It was denied that the $5,500,000 was agreed to be paid on the foreclosure suit; it was denied that the amount bid was nominal; it was denied that the real amount the purchaser was to pay on the foreclosure suit was $5,500,000; it was denied that there was no payment to the

officers; it was denied that the bid at the foreclosure was treated as part of the $5,500,000; it was denied that the trustees in the mortgages had never had their money; it was denied that any agreement was made to bid $5,500,000 at the foreclosure sale, and the answer set forth, that at the sale under the foreclosure the property included in the plaintiffs' mortgage brought only $800,000, the first division $1,000,000, and the Oskaloosa division $300,000, leaving nothing on the last mortgage, and that on the foreclosure sale the money was not paid to the master, but the Chicago and Rock Island Railroad Company loaned the amount bid to the Chicago, Rock Island, and Pacific Railroad Company to pay the trustees under the mortgage. The committee, Stanton and others, had the bulk of the mortgage bonds. They delivered to the Chicago and Rock Island Company these bonds, and the Chicago and Rock Island Company paid the trust-company certificates, and furnished the trustees in the mortgages the requisite money to pay off the non-assenting bonds. They alleged that the facts fully appeared on the trial of the Howard case, and reference was made to that case and the proofs therein.

We should have stated in the proper order that the foundation alone on which Howard's case rested, and on which the court below and this court acted, was that the fund now in controversy was no part of the foreclosure procedure. If it had been, we could not have recovered without showing a payment of the whole mortgage debt out of which it arose. If any question was decided and finally and completely ended in any cause, that question was settled by the Howard decree. It cannot be reviewed now. The whole history of the sale of the Mississippi and Missouri Company and sale is fully set out in the answer. All the material allegations of ownership by any of the plaintiffs in the bonds claimed by them is denied. It is denied that the fund in court is any part of the foreclosure sale.

As to the claims of the plaintiffs, the defendants denied that the bonds and coupons claimed by the plaintiffs are theirs, but really the property of the Chicago, Rock Island, and Pacific Rail-

road Company. As to the 800 coupons claimed by McCollum, the defendants averred that 200 of them were blank, never signed; that they were detached by said company from bonds while in their possession, and which were subject to the scale of sale of 20th October and 1st of November, 1865, and after payment had put been in circulation by the Chicago, Rock Island, and Pacific Railroad Company. The answer further sets forth the settlement under the sale of November, 1863, gave the number of non-assenting bonds in detail $185,500, and averred that the Chicago, Rock Island, and Pacific Railroad Company had on hand, to meet this debt, their *pro rata* share $128,136 31, and $83,133 52 retained from the other assenting bondholders to pay the claims of the non-assenting bondholders; and that said company, if they have neglected to pay them, or had put them in circulation, alone are liable therefor; they set up a matter of law, that Foster and others had no claim as mortgagees, because the mortgage property was sold, the proceeds delivered to their trustees, and they must look to them; that their time to do so had elapsed, and they were barred, referring to that clause of the decree (case 344, page 51) which required them to prove their bonds or be barred; that they had no lien on the fund in court, because it was derived from a private sale of the assenting bond and stockholders, and no bondholder has any claim, unless he assents thereto; that they have no right to it as general creditors, because Howard and others, by superior diligence, have gained a preference, and they have no right as general creditors at all, because the fund was made for the benefit of all the stock and bondholders who should assent, and they will not be allowed in equity, by refusing their assent, to gain more than those who, by their concessions, have created this fund. Replication was filed and proofs taken. The Chicago, Rock Island, and Pacific Railroad Company answered, denying in general terms the facts and theory of the plaintiffs' case.

The proofs established the following facts: It was admitted that the bonds and coupons claimed by McCollum belonged to the Chicago and Rock Island Railroad Company; as to the

coupons that they were due on 8th March, 1864; that they were part and parcel of 800 bonds of $1,000 each deposited by the Mississippi and Missouri Railroad Company in 1863, as security for a loan of $500,000, at 7 per cent.; that the interest due was not paid on January 1, 1865; that on 23d December, 1865, the Rock Island Company released their equity of redemption on the 800 bonds, and the debt of $500,000 was extinguished; that on January 21, 1866, the Chicago and Rock Island Company assented to the terms of sale of November 1, 1865, having after the release detached these coupons from the bonds; that on March 27, 1869, John F. Tracy, as agent of Chicago, Rock Island, and Pacific Company, sold these coupons to his brother-in-law, McCollum, for 50 per cent. of the amount due, and took his note therefor, payable in three years; that the bonds claimed by McCollum were, at the time of the sale of Mississippi and Missouri road, the property of Thomas C. Durant, and he held them until after the contract of August 1, 1866, between the Stanton's committee and the Chicago, Rock Island, and Pacific company; that after the execution of that contract, and before the confirmation of the sale in the foreclosure suit, Durant threatened to delay the transfer because, he was excluded from the benefits of the Peter Myers contract; that Dows, a director of the Rock Island Company, between these periods, purchased them of Durant for $54,000, the scale price, for the benefit of the Chicago, Rock Island, and Pacific Railroad Company; that the said company owned them until the sale of the coupons to McCollum, when they sold to him, through Tracy, at the same *price as* the coupons, and same credit, both sales being one transaction. (See agreement, case 406, pages 30 to 36.)

The Bardwell and McComb bonds.

McComb testifies (in case 406, p. 121) that he knew nothing about this suit, or the position he occupied in it; that he gave his securities and Bardwell's to Ebenezer Cook to collect, not more than a year before his deposition was taken, in September, 1869; that he did not know nor inquire what he had done with them; did not know Polk, and Hubbel, and Nourse,

who appeared as counsel for Bardwell and himself; had paid no fees; gave Ebenezer Cook unlimited authority. It was also proved by the testimony of John Elliott, (case 406, pp. 40, and 41,) that by an agreement in writing, of 3d July, 1866, and 9th July, 1866; the committee, Elliott, and others were not to bid at the foreclosure sale; but the Chicago, Rock Island, and Pacific Company was to purchase the property if it could be had at the price of $5,000,000, and were to perform the contract of 1st November, 1865.

On the 1st of August, 1866, the Chicago, Rock Island, and Pacific Railroad Company agreed with Stanton, Elliott, and Wilson, as follows, (see case 406, pp. 44, and 45, of Elliott's deposition:)

1. As agents of Stanton, Elliott, and Wilson, to distribute the bonds to the bondholders, and to fulfill all the obligations of the committee under the Peter Myers agreement, (to pay the assenting bondholders.)

2. To pay all the costs and expenses of the purchase of the Mississippi and Missouri Company.

3. To give the plaintiffs in the foreclosure suit all they were entitled to receive, (that is, their whole debt: ergo, to pay the bonds of Foster, Bardwell, and McComb.)

4. To pay the committee $21,000 in bonds for their services.

5. To save the committee harmless from all claims arising out of the Peter Myers agreement.

6. To draw on the reserved interest, in closing up the Peter Myers agreement, but not until they had paid out $5,500,000.

In execution of this trust the Chicago and Rock Island and Pacific Railroad Company retained from each holder of the surrendered bonds three months' interest on the amount due on the trust company's certificates of scaled bonds, which made $83,837 83 (which amount they still hold,) see Wilson's deposition, case 406, page 74; also Elliott's, page 91, taking a receipt in full. (Case 406, page 38.)

It was also proved that James & Co. commenced the foreclosure suit of Durant *et als.* to foreclose the last mortgage.

They held $600,000 of that mortgage, and their bonds were sealed at 30 per cent. The Chicago and Rock Island Railroad Company purchased James & Co.'s bonds: $600 at 45 per cent., and $16,000, one half the money set apart for the foreclosure expenses. (Case 406, page 37, agreed facts.)

It was also proved, in the letter of John P. Cook to Elliott, Nov. 13, 1868, that the Chicago and Rock Island Company desired to get any surplus which could be made to reduce the cost of this purchase. Cook's letter to Elliott, (case 406, page 96.) And it was also proved that Cook and Drury got a transcript of Foster's suit, and got Foster to send out his bonds, to be used to prevent the execution of the decree. (Cook and Drury's letter to Elliott, 1st November, 1868, case 406, page 93.) "After a fight all summer, at rule days of the court, to keep the fund out of the hands of the receiver—the Foster suit saved us."

On the 29th of October, 1869, a motion of Howard to execute this decree was overruled, (case 406, page 28;) and again on 8th November, to distribute all, or, if that was refused, all but enough to answer plaintiff's demand; which was overruled, because the bond filed superseded any action by the court, (case 406, page 139.)

The Chicago and Rock Island and Pacific Company, with the rest, appealed, and is now before this court; and the execution of Howard decree is staid upon any of them giving bond in the sum of $700,000.

ARGUMENT AS TO THE MANDAMUS.

1. That a judgment or decree affirmed by this court cannot be altered by new pleadings or evidence in the court below, but must be executed in the exact manner in which it is affirmed.

Such is the rule in the State courts.

"The circuit court in the remanding of a cause, has but a single duty to perform—to do the specific act required, which it is not at liberty to disobey or disregard."

Ogden *vs.* Brown, 4 Scammon, 301.

"Where a final judgment has been rendered in the Supreme Court, it is not open to any further proceedings in the circuit court."

Abrams *vs.* Lee, 14 Illinois, 167.

"Where the decree is affirmed in all its parts, the controversy is at an end. In such case, the circuit court has no power to allow amendment of the pleadings or to change the decree. It can only proceed to have it enforced according to its terms and conditions."

Chickering *vs.* Failes, 29 Illinois, 302.

"The appellate court may sometimes mistake the record, and be liable to err in matters of law so long as men are liable to differ in opinion. But the decision in the particular case is forever the law of that case, and is, conclusive, not only on these points, that appear to be noticed or directed by the opinion of the court, but on every question of law or fact presented by the record, and which was necessary to have been decided to enable the court to arrive at such conclusion."

Briscoe *vs.* Tucker, 14 Arkansas, 515, 523.

A cause reversed, and mandate for judgment in conformity with its reversal. "Under these circumstanses it would be a most novel practice for the circuit court to open the cause for new testimony, and re-try the cause. Under chancery practice, no one would have thought of re-opening the case and taking additional proofs. Otherwise the circuit court might go on re-hearing causes forever."

Miner *vs.* Medberry, 7 Wisconsin, 100, 102.

"A former decree of the court of appeals is conclusive, and no error can be imputed to the court below, if it conforms in its subsequent proceedings to the principles of that decree. Facts, which had occurred before the first decree below, ought to have been presented before the original hearing. Parties must indicate their rights in due season."

Young *vs.* Frost, 1 Md. Chan. 377.

This question has been conclusively settled in this court by a series of decisions, which the court will have no disposition to reverse.

"An appeal does not lie from the refusal of a court to open a former decree, nor have the circuit courts power to set aside their own decrees, on motion, after the term at which they were rendered."

Cameron *vs.* McRoberts, 3 Wheaton, 591.
Brocket *vs.* Brocket, 2 Howard, 238.
McMichen *vs.* Perrin, 18 Howard, 507, 511.

"No principle is better settled, or of more universal application, than that no court can reverse or annul its final decrees or judgments, for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes, (3 Wheaton, 591; 3 Peters, 431,) or to reinstate a cause dismissed by mistake, (12 Wheaton, 10,) from which it follows, that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review are exceptions, which cannot affect the present motion,

"When the Supreme Court have executed their power in a cause before them, and it requires further action, it sends a mandate to the court below. Whatever is before this court, and is disposed of, is considered finally settled. The inferior court is bound by the law of the case, and must carry it into execution according to the mandate. They cannot vary or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much has been remanded. (1 S. C., 194, 197, 1 H. and M., 557; 3 Mumf., 228.) After a mandate, no re-hearing will be granted. It is never done in the House of Lords. (3 Dow., P. C., 157.) And on a subsequent appeal nothing is brought up, but the proceedings subsequent to the mandate. (5 Cranch, 316; 7 Wheaton, 58, 59; 10 Wheaton, 443.")

Ex parte Sibbalds, 12 Peters, 488, 491.

And a mandamus is the proper remedy when the court below does not obey the mandate.

Where a cause has been decided on its merits and remanded to the court below, and brought again here, it is too late to allege that the court had not jurisdiction to try the first appeal.

The Supreme Court has no power to review its decisions,

whether at law or equity. A final decree is as conclusive as a judgment at law.

Wash. Bridge Co. *vs.* Stewart, 3 Howard, 413.

"The superior court of Florida had no power to grant a re-hearing, because the decree of this court, made in affirmance of that below, is conclusive in the inferior court. It has no authority to disturb it, by the mode proposed, but can only execute our mandate. We refer to the rules laid down in *ex parte* Sibbalds, 12 Peters, 489, to which nothing need be added."

Chairies *vs.* The United States, 3 Howard, 611–620.

"We have repeatedly decided as to judgments of this court, that they could not be changed at a subsequent term in matters of law, whether attempted on motion, or a new writ of error or appeal on the mandate of the court below."

Bank United States *vs.* Moss, 6 Howard, 31–41.

A mandamus was issued from this court to compel obedience to the mandate of this court in *ex parte* Dubuque and Pacific Railroad, (1 Wallace, 69,) and *ex parte* Milwaukee Railroad Company, (5 Wallace, 825.)

2. We hold that no bill of review could be allowed by the court below.

"This bill of review seeks to review the decree of the court below, entered in pursuance of the mandate of this court. It is the decree of this court, and not that first entered below, that is sought to be interfered with. The better opinion is that a bill of review will not lie at all for errors of law on the face of the decree after affirmed by the appellate court. Nor will a bill of review lie in case of newly discovered evidence, where a decision has taken place on appeal, unless the right is reserved by the appellate court. This appears to be practiced in the court of chancery and the House of Lords in England, and we think it founded on principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits." (Citing many cases.)

Southard *vs.* Russell, 16 Howard, 347, 300.

3. The court below not only reversed the decree as affirmed, but so far as the subrogation of the trustees of the stock-

holders to the guaranteed bonds was concerned, without any petition or even motion for that purpose.

"Affirmative relief will not be granted a defendant in equity unless asked by a cross-bill."

McLaughlin *vs.* O'Rourke, 12 Iowa, 459, 563.

It will be argued that Foster and others were not parties to the decree and not bound by it.

We answer, that if all the necessary parties were not before the court when the case was originally heard, it was the duty of the court to require the plaintiffs to bring them in, and a failure to do so was grounds of error in that cause.

"If plaintiff sues for self and others, it should be so stated, and if he omits it, the bill is liable to objection for want of parties, and in other cases deprive the plaintiff of the relief he seeks." (1 Dan. C. P., 364.)

But this court, in affirming the decree, decided that neither the bondholders nor stockholders were necessary parties, and they held, by implication at least, that no other parties were necessary, and the plaintiffs in Howard suit had a right to file a bill as general creditors for themselves alone, and thus gain as at law a preference by the judgment in their favor over other creditors of the same degree who may not have used equal diligence. (1 Daniel, 229, and cases cited.)

And the following cases to the same point:

Gordon *vs.* Lowell, 21 Maine, 251.
Lucas *vs.* Arnold, 2 Stewart, 378.
Corning *vs.* White, 2 Page, 567.
Ogilvie *vs.* Knox Ins. Co., 2 Black, 539.

No right to intervene in this cause.

Brunson *vs.* R. R. Co., 2 Black, 524.
U. S. Bank *vs.* Burke, 4 Blackford, 145.
George *vs.* Williamson, 26 Missouri, 190.
Myers *vs.* Zanesville M. Co., 11 Ohio, 273.
Same *vs.* Same, 13 Ohio, 197.

This last case is precisely in point, being against a corporation, intended to reach its assets and a race between creditors.

The assets of this corporation are legal assets, "which, if found, could be levied upon."

Curran *vs.* Arkansas, 15 Howard, 304, 307.

MOTION TO DISMISS THE FINAL APPEAL.

The court will perceive that the appellants regard the final appeal as superseding the interlocutory appeal; they gave a bond for $700,000, and when we again moved to execute the decree for the residue of the fund, after enough to satisfy the claim of Foster and others, the court overruled it, because the supersedeas bond suspended the whole original decree.

Under this view of the case, the dismissal of the appeal in 3044, would do us no good. It is true, that when the court below allowed the appeal and supersedeas, from the order giving to Howard and others $400,000 of the fund, that matter was withdrawn from the consideration of the court, until the appeal was heard here; but the court and opposing counsel thought differently, and this is the explanation of the dispatch in the trial of the cause below, and bringing up the case by an appeal from the final order.

It follows as a necessary consequence of the principles laid down in the argument already made, that this appeal too must be dismissed. If it is not, suppose this court on trial affirms the decree last made, when it goes below the parties who manipulated this cause have or can have another person who has claims or can make claims, and can intervene again, and though the court may think the claim as fraudulent as McCollum's, and dismiss it, yet he can appeal and thus tie up this fund forever.

We not only desire to dismiss the last appeal, but we wish the highest damages which can be given. The record evidence in this cause shows the Chicago, Rock Island, and Pacific Company to have been served with process in the Howard suit on the 9th of July, 1866. The corporation answered that they had become the agents of the Stanton committee to

distribute these funds and had no defence to make, but ask a decree protecting them. The evidence shows, that writing on the 1st of August, 1866, the said company not only became the agents of this committee, but absolutely agreed to pay the whole amount of every bond which has been brought into this suit. After this agreement, the agents of said company, Dow, director, Cook, director and secretary of that company, caused Foster, McCollum, and Bardwell to give these claims to their attorney to collect, when it was their duty to pay them; and their attorney avers, that he and the Foster claim to delay the execution of the Howard decree, and that alone "saved us."

Nor is this the whole of this trifling with the court, and the rights of the Howard party and the Stanton committee party. The Rock Island Company on the 1st August, 1866, assumed the agency of the Stanton committee, and agreed to pay every claim now in suit. After this date the said company, through Dow, its director, purchased the bonds now claimed by McCollum, and paid the scale price, 70 per cent., which was in their possession as agents. They kept and held these McCollum bonds when they answered Howard's suit, and after they were included in the foreclosure judgment, which they agreed to pay. Their President Tracy sold them to his brother-in-law at 50 per cent. on three years time, and they were used by him to retard the enforcement of the decree affirmed by this court in which they were parties.

And it appears that the said company, with an equally fraudulent intent, cut off the coupons for November, 1864, from eight hundred bonds, which they took of the Missouri and Mississippi Company at 62½ per cent. and put into the Peter Myers agreement at 70 per cent., and kept and retained them in their possession until after they had answered in the Howard suit that they had no defense to make and only asked protection; and after the affirmed decree by their president, Tracy, assigned them, with two hundred of them even unsigned, and nothing but waste paper, to his brother-in-law McCollum, and put him forward as an intervenor in the Howard suit to delay the execution of it and defraud the

stockholders of Mississippi and Missouri, by diminishing a fund which they had assumed an agency to protect.

With this recital, we ask and expect to receive all the damages which this court can inflict on them. If the court should not think we are entitled to a dismissal in *toto*, we certainly are to all of the fund which exceeds the claims presented by Foster & Co.

JAS. GRANT,
For Howard and Others.

JNO. N. ROGERS,
Of Counsel for Howard and Others,
Plaintiffs in Original Suit.

U. 544,206

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1869.

McCollom

FREDERICK A. FOSTER, et als, APPELLANTS,
vs.
MARK HOWARD, et als, APPELLEES.

APPEALS FROM THE CIRCUIT COURT FOR THE DISTRICT OF IOWA.

44.406

UNITED STATES, ex rel, MARK HOWARD, et als,
vs.
THE JUDGES OF THE U. S. CIRCUIT COURT FOR THE DISTRICT OF IOWA.

MANDAMUS FROM SUPREME COURT.

11

BRIEF FOR HOWARD ET ALS, APPELLEES AND RELATORS, ON MOTIONS IN THE ABOVE ENTITLED CAUSES.

I.

Of the two appeals taken by Foster et als, viz: first, from so much of the interlocutory order made on their petitions for leave to become parties, &c., as refused to suspend execution of the original decree, except as to part of the fund; and second, from the final decree made on their crossbill, disposing of their claims on the merits, the former, besides being improperly allowed,

as taken from a non-appealable order, (see authorities cited by Mr. Grant, also, Young v. Grundy, 6 Cranch, 51), is superseded and rendered nugatory by the final decree which is the subject of the latter. The interlocutory order, so far as it related to suspension of the original decree, was merely provisional and temporary, and was superseded or vacated by the final decree, adjudicating petitioners' claims upon the merits, and finally disposing of the whole fund. It is like an order for a temporary injunction, followed by a decree dismissing the bill. The first appeal, even if it ever had any virtue, is now *functus officio*, and should be dismissed.

II.

The Circuit Court had no right nor power, after Howard et als. had by their superior diligence procured the payment of this fund into Court, and a decree for its distribution to themselves as creditors of the M. & M. Co., and after affirmance of that decree in this court, to open it to let in other creditors, having no superior rights, to reap the benefit of the complainants' exertions.

Nothing is better settled than that a judgment creditor, by first filing his bill to reach equitable assets of the debtor, gains a lien thereon paramount to other creditors, who subsequently file similar bills; (McDermott v. Strong, 4 Johns. Ch. 687; Weed v. Pierce, 9 Cow., 728, 729; Beck v. Burdett, 1 Paige, 305, 309; Edmeston vs. Lyde, 1 ib. 639; Eager v. Price, 2 ib. 333, 338; Corning v. White, 2 ib. 567; Burrall v. Leslie, 6 ib. 445). And though the property of a corporation is regarded in equity as a trust-fund for the payment of its debts, this does not give any particular creditor, as such, a vested interest therein, nor prevent the corporation itself from paying one creditor in full out of such assets, in preference to another, nor one creditor from

acquiring a priority over others by levy of attachment or execution at law, (when the property can be reached in that way), or by proceedings in equity which are equivalent thereto, when the assets are of an equitable character. "*If held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process*," &c., (per Clifford, J. in this case, 7 Wall. 410). And see Myers v. Zanesville M. Co., 11 Ohio, 273, and 13 ib. 197. Certainly, what Howard et als. had done to appropriate this fund to payment of their claims, prior to the presentation of the petitions of Foster et als, was of no inferior force or virtue to a levy at law.

The pretense of a superior lien on the fund, in favor of Foster and als, by virtue of the mortgages on the M. & M. R. R. is simply frivolous. The fund was not realized by a *foreclosure* sale, but by a sale by *private contract*, the vendors, as preliminary to the fulfillment thereof, *having obtained title* by means of a foreclosure. Such was the view taken by this court, on the former appeal, (See 7 Wall. p. p. 408, 414), and its correctness is decisively shown by the single fact, that while the road was sold under the foreclosure in parcels, corresponding to those embraced in the respective mortgages, the $5,500,000 was the price agreed to be paid for the whole road as an entirety, without any reference to the value of its several divisions. We would thank our opponents to inform the court *how much* of the fund was realized by the foreclosure of *their* mortgage, viz: that of the western division; or by what rule the proportion is to be ascertained.

III.

Mandamus to the Circuit Court, requiring it to execute the original decree, is the proper and only adequate remedy. If the court below was wrong in letting

the appellants in at all, and in suspending the execution of its decree; if the appellants had no *status* in the case; then we cannot be compelled to yield them the ground thus wrongfully gained, by awaiting the final issue, in this court, of a litigation into which they had no right to compel us to enter. Otherwise this fund might be locked up forever by successive parties intruding themselves into the case, each claiming that he was not bound by what had been adjudicated against his predecessors.

IV.

The authorities cited by counsel for Foster et als. in support of their position that while the fund is still in court, though after a decree disposing of it, third parties claiming an interest in it are allowed to intervene and set up their claims, have no application to this case. They relate to cases where the parties so intervening have *vested* rights to or liens upon the fund, anterior to their commencing proceedings to enforce the same; and not to the case of different creditors successively pursuing property of their common debtor, which, though liable to be appropriated by any or all of them to the satisfaction of their respective claims, through the ordinary remedies at law or in equity, is subject to no specific lien in favor of any particular creditor, prior to the acquisition of such a lien by a resort to those remedies. The latter is the present case. Foster et als. are simply creditors of the M. & M. R. R. Co., just as Howard et als were. The fund was open to the pursuit of all alike, but some have been more diligent than others, and by the use of legal remedies have acquired a priority—just as they would have done if the fund could have been reached by execution, and they had first levied on it.

V.

The appeal of Foster et als. cannot operate as a supersedeas of the original decree. The case stands thus: The fund, amounting now to more than $650,000, being in the custody of the court, and Howard et als. having obtained a decree for its distribution among themselves, which has been affirmed by this court. Foster, et als, present petitions claiming, in the aggregate, about $150,000 of the fund, and move for a suspension of execution of the decree *in toto*, until their claims are adjudicated. The court orders a sum deemed more than enough to pay their entire claims, in any event, viz: $200,000, to be reserved, and directs execution of the decree as to the remainder. The latter direction was quite supererogatory, and the right of Howard et als. to such execution in no degree depends on this order, as the original decree would of course have to be executed, except so far as a suspension thereof was ordered. From the *refusal to tie up the whole fund* embodied in this order, the *first* appeal of Foster, et als. is taken, and the court below held it to operate to suspend distribution of the *entire fund*, that is, as a supersedeas of the original decree *in toto*. Afterwards the claims of Foster et als. are brought to a hearing on the merits, and a further decree is made, finding that there is due to them, out of the $150,000 claimed, about $17,000; awarding them a dividend on that sum, *pro rata* with the original complainants, which would make their share of the fund about $10,000; and opening the original decree so as to let them in to share in its benefits on this basis. From this their *second* appeal is taken, which is also claimed, and by the court below *allowed* to work a supersedeas of the entire original decree.

We deny that it has any such effect. If it has, then it is in the power of anybody at his sole will and pleas-

ure to suspend the execution of any decree for the disposition of a fund in court, by simply claiming it, in part or in whole, moving for a suspension of the decree until his claim is passed on, and appealing from the denial of his motion; and the fund may be tied up forever, by a repetition of the same process, *ad infinitum*. It makes no difference that the court below ordered a suspension as to *part* of the fund. As to the residue of it, the case is the same as though no such partial suspension had been granted. If the claim of the appellants as to the effect of their appeal is well founded, then it logically follows that if their petitions had in the outset been totally rejected, and no suspension to any extent granted, they could still have arrested the execution of the decree by taking an appeal.

The case, as to supersedeas, is precisely like an application for an injunction to stay execution of a judgment at law on equitable grounds. Suppose the complainant, on filing his bill, moves for a temporary injunction, and his motion being denied, appeals from the order of denial; can such appeal be made of itself to operate as an injunction, and prevent the execution of the judgment by virtue of a "supersedeas?" On the contrary, an appeal from an order or decree *dissolving* an injunction once actually granted, will not, by way of supersedeas, continue the injunction in force, pending the appeal.

Hoyt v. Gelston, 13 Johns. 139.
Wood v. Dwight, 7 Johns. Ch. 295.
Hart v. Mayor of Albany, 3 Paige, 381.
Graves v. Maguire, 6 ib. 379.

And this court held, in *Young v. Grundy*, 6 Cranch, 51, that an interlocutory order dissolving an injunction was not appealable.

The truth is, that there is and can be no such thing as a supersedeas, attendant on an appeal from an order,

judgment or decree, simply in *denial* of the appellant's claim. In such case there is nothing to supersede. A party can in no case actually *obtain* the relief (whether final or temporary), which the court has denied him, by appealing from the order of denial. Yet this is precisely the attitude of Foster et als. the appellants. They do not appeal from the original decree, to which they were not parties, which was rendered before they appeared in the court, and upon which alone and independent of any subsequent proceedings, the rights of Howard et als. depend. They commenced a new and subsequent proceeding, to obtain relief out of the fund disposed of by that decree, and in aid of such proceeding, they applied for a suspension of the execution of the prior decree. That is, in effect they asked for a temporary injunction against such execution. They obtained in the first instance, a provisional and temporary suspension *in part*, appealed from the *refusal* of a suspension *in toto*, and claimed that the appeal *gave* them (what the court had denied), a suspension *in toto*, and the court below sustained them in that position! Still further, on final hearing the court dissolved its provisional order of partial suspension (which had reserved $200,000 out of the fund), by granting Foster et als. about $12,000, and dismissing the residue of their claim. They again appeal, and claim that this appeal operates, by the magic spell of "supersedeas," not merely to continue in force the original order of temporary suspension as to the $200,000, but to suspend the original decree *in toto*, and indefinitely tie up the whole fund of $650,000 and upwards; and the court below sustains them in *that* position!

This, we submit, cannot be the law. Suspension of the execution of a decree, as the result of an appeal, is a matter of strict right, and not dependant on the discretion of the court below; and according to appellants

doctrine, as already remarked, a fund might be tied up forever by a succession of appeals, however plainly frivolous.

We claim that even if the court shall be of opinion that the court below had the right to entertain the applications of Foster et als. and that its proceedings subsequent to the decree have been correct, still, no right to suspension of the original decree, beyond that granted by the court below, has been acquired by appellants by virtue of their appeals, and that since the Circuit Court has refused to execute that decree to any extent whatever, it should be compelled to do so by mandamus from this court.

Our petition in this court was so framed as to ask for a writ commanding execution of our decree, either complete, or to such extent as the court should deem us entitled to; and since it is entirely discretionary with the court to grant a peremptory writ in the first instance (Knox Co. v. Aspinwall, 24 How. 376), and all the facts are before it, and all the parties have been fully heard, it should be no obstacle to the granting of a mandate directing the execution of the original decree, except as to the sum awarded to Foster et als. by the last decree, (if the court should deem us entitled to no more,) that the alternative writ which has been issued goes beyond that measure of relief.

JOHN N. ROGERS,
of Counsel for HOWARD ET ALS,
Appellees and Relators.

Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN V. MCCOLLUM *et als.*, Appellants,
vs.
MARK HOWARD, *et al.*
} No. 406.

THE UNITED STATES on the relation of MARK HOWARD *et als.*,
vs.
THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.
} Original suit No. 11.

Argument for the appellants in opposition to the motion made by the appellees to dismiss this appeal, and for the respondents in original cause, No. 11.

The motion purports to be made, because the decree of the circuit court was one "which modified a final decree of this court, with a stay of execution, and no appeal will lie in such a case."

It is proper to say in the outset, that the merits of this cause are largely involved in this motion, and therefore we will state them as concisely as we can, but shall hereafter insist, that, because they are so connected with the motion, it ought for reason alone to be denied, as was held by this court in the case of Day *et al.*, *vs.* Washburne *et al.*, (23 Howard, 309.)

The Mississippi and Missouri Railroad Company was a corporation established by law in the State of Iowa; it was deeply

in debt, became insolvent, and the mortgages upon its line of road, franchises, and property were foreclosed, and all the property of the company purchased by the Chicago, Rock Island, and Pacific Railroad Company, pursuant to an agreement made in the city of New York in October, A. D. 1865, between the larger number of the bondholders, stockholders, and a committee acting on behalf of the creditors of the company.

It is to be kept in mind that neither all the bondholders nor all the other creditors of the company were parties to this arrangement for a sale of the corporate property, and that it was a part of that arrangement that sixteen per cent. on the capital stock of the company should be paid to the shareholders out of the funds realized from the sale of the company's property, which would amount to about $552,400.

Pursuant to this arrangement, in February, 1866, a suit for the foreclosure of the mortgages upon the property and franchises of said company was instituted in the circuit court of the United States for the district of Iowa and rapidly prosecuted to a final decree and order of sale, and in July, 1866, a sale of the mortgaged property was made under that decree by the master in chancery to the Chicago, Rock Island, and Pacific Railroad Company.

On the same day that sale was made, (July 9, 1866,) Mark Howard and John Weber commenced in the same court a suit in equity against all the parties to the foreclosure suits, and in their bill stated, in substance, that they had recovered judgments against the Mississippi and Missouri Railroad Company for its default in not paying certain bonds of the city of Davenport, which had been guarantied by said railroad company, and were not paid by said city of Davenport, although they had recovered judgments against that city upon its bonds, and that said Mississippi and Missouri Railroad Company was then utterly insolvent; that all its property had been sold under said decree of foreclosure, and that there was no other property out of which their judgments could be made, than the said sum of $552,400, which was to be paid the shareholders in said company out of the proceeds of the foreclosure sale.

That suit was originally prosecuted against all the parties defendant, who appeared and answered, and during the progress of the cause fourteen other persons appeared and presented claims, amounting to over $800,000, against the same fund, and under substantially the same legal rights as those asserted by the original complainants, Howard and Weber.

The names of the parties who thus appeared and became co-complainants, or, as they were called in the proceedings, "intervening claimants joining in the bill," were Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsy, Tracy, Harriet le Conte, Margaret L. Nisbet, Joseph W. Clark, Volkert B. Dows, Christopher Y. Lansing, and Jared F. Harrison, and their names have ever since appeared in all these proceedings; and they established their right as creditors to share in the distribution of the funds set apart to the shareholders for a very large amount, about $800,000, equally with Howard and Weber, the original complainants.

During the progress of that suit, on the motion of the complainants and "intervening claimants," a receiver was appointed by the court to collect and hold, subject to the order of the court, the fund which the complainants were seeking to subject to the payment of their claims against the Mississippi and Missouri Railroad Company, and on the 28th day of October, 1868, the receiver reported that he had received $450,000 of the first mortgage bonds of the Chicago, Rock Island, and Pacific Railroad Company, with interest coupons attached, and the residue was afterwards paid him, and he has ever since held the funds, which are drawing interest at the rate of 7 per cent. per annum, subject to the order of the court.

The suit was prosecuted to a final decree entered in May, 1868, in which the circuit court decreed that the complainants and "intervening claimants" were entitled, as creditors of the Missouri and Mississippi Railroad Company, to the sum of money that was to be distributed among the shareholders of said company, and that the fund, which was found by the decree to amount to $541,527, should be distributed *pro rata* among the several complainants and intervening claimants in

that cause, whose respective claims were ascertained and declared in said decree.

From that decree the defendants appealed to this court, and the cause was heard and decided at the December term, 1868, and the decision is reported in 7 Wallace, 392, under the title of The Railroad Company *vs.* Howard *et al.*

The decree of the circuit court was affirmed, and the principal question made in the case, and decided by this court, was; that the creditors of the insolvent and defunct Mississippi and Missouri Railroad Company were to be first paid out of the property of the company, before the shareholders were entitled to anything, or to any part of the sixteen per centum which had been agreed should be paid them out of the proceeds of the foreclosure. On this point the court used the following language:

"Present suit is not one against stockholders, to compel them to pay a corporate debt due out of their own estate, but it is a suit against the corporation and certain other parties holding or claiming assets which belong to the principal respondent, to prevent that fund from being distributed among the stockholders of the corporation before the debts due to the complainants are paid. Viewed in that light, it is obvious that the stockholders are precluded by the judgment from denying the validity of the instruments of guaranty; and that the judgments are conclusive as to the indebtedness of the corporation."

In pursuance of this decision, a mandate was sent to the circuit court, showing that the decree of that court had been affirmed, and commanding "that such execution and proceedings be had in said cause, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding."

The mandate was filed in the circuit court at the May term, 1869.

This statement of the history of the cause will not, probably, be controverted in any particular by the appellee's counsel. It nearly all appears in the case reported in 7 Wallace, 392, and more fully in the record of the cause of McCollum *et als. vs.* Howard *et als.*, No. 344 of the present term.

The point of that decision, and the effect of the affirmance of the decree of the circuit court, was to declare that the complainants and "intervening claimants" were to be paid their claims out of the assets of the corporation, before the shareholders could realize anything from the proceeds of the foreclosure sale; but neither this court nor the circuit court decided that no other creditors than those before the court had a right to be paid out of it. And the question in this case upon the merits will be, whether the present appellants, who are the owners of nearly $100,000 of the mortgage bonds of the Mississippi and Missouri Railroad Company, and who never assented to the scheme of settlement agreed upon in New York, in October, 1865, have any legal claims upon the funds in the hands of the receiver, either paramount or equal to those of Mark Howard and the other complainants and claimants.

The claims of the petitioning bondholders should be preferred, to those of the general judgment creditors, and Howard and all the other original claimants belonged to the latter class, (Pennock *et al. vs.* Coe, trustee, 23 How., p. 117,) and in this case those creditors who first filed their bill, have no preference over the others. (Day *et al. vs.* Washburne *et al.*, 24 How., p. 352.)

But we insist this is not the proper mode of trying the merits of the case, nor of adjusting the equities between the different parties to the record.

In Nelson *et al. vs.* Leland *et al.*, (22 How., p. 48,) this court decided it would not determine a question of jurisdiction in the district court where the cause originated, upon a motion to dismiss the appeal to this court.

In Day *et al. vs.* Washburne *et al.*, (23 Howard, p. 309,) a case very similar to this in many of its features, this court refused to dismiss an appeal, because the irregularities in the appeal and proceedings were so closely connected with the merits, that the court would not summarily dispose of them upon a motion to dismiss the appeal, but would reserve them for consideration when the case was argued on the merits.

The motion in this case, and the proceeding by mandamus

in original cause No. 11 of this term, are all intended to procure a summary decision upon the rights of Foster, McCollum, Bardwell, and McComb, to the fund in the hands of the receiver.

The proceedings in the circuit court subsequent to the filing of the mandate of this court, were allowed by that court in the belief that Mark Howard, and all the parties who joined him in the prosecution of that suit, did not acquire an exclusive right to the fund as against Foster, McCollum, Bardwell, and McComb, by filing their bill and obtaining a decree; but that all creditors standing in the same relation to the fund had a right to share in the distribution of it, as their rights might appear, while it remained in the circuit court; and, also, that the affirmance of the decree entered in the original cause did not give them any exclusive right to the fund, or any greater or different rights than they had before.

The decree in Howard's case, that was affirmed by this court at the last term, awarded to Howard and his co-complainants all the funds in the hands of the receiver; and besides those funds there was no other property of the Mississippi and Missouri Railroad Company that could be applied to the payment of its debts. It was utterly insolvent.

The claims of Howard *et als.* were some of them in judgment, and some of them merely simple contract debts. My associate, Mr. Withrow, will show from the record in case No. 344, of this term, that nearly half of the claims which were presented and allowed were *not then due, and are not yet.* They were all, those in judgment, as well as those due by simple contract, founded upon guaranties by the Mississippi and Missouri Railroad Company of bonds issued by sundry cities and counties in the State of Iowa.

The circuit court decreed that the claims of Howard *et als.*, due and not due, should be paid out of the funds in the hands of the receiver, before the shareholders should receive any part of the sixteen per cent. which had been awarded them by the agreement made in October, 1865, for a foreclosure and sale of the road.

Although the bill filed by Howard and Weber originally,

did not purport to be filed for the benefit of any one else, yet, as before stated, fourteen other persons were afterwards allowed to come in as parties complainants, and share in the fruits of the litigation. It seems to us this was a proceeding to reach the equitable assets of an insolvent debtor by proceedings in equity. None of the parties had any judgment liens, or legal priorities on the fund they were pursuing. In such cases equality is equity, and the funds will be distributed *pro rata* among all the creditors who appear and establish their claims.

Day *et al. vs.* Washburne, 24 Howard, 352.

Upon well settled principles of equity practice and principle, so long as the fund remains in court, or any part of it, the court will distribute it *pro rata* among all who establish any right to it.

Wiswall *et al.*, *vs.* Sampson *et al.*, 14 Howard, 52.
Williams *et al.*, *vs.* Gibbs *et al.*, 17 Howard, 257.
See the opinion of Lord Eldon in Gillespie *vs.* Alexander, 3 Russell, 136.

In this state of the record, the fund being in fact in the hands of the receiver, and, as we think, the circuit court and this court not having decided anything more than that Howard and his associates were to be paid out of the fund before it should go to the stockholders, Foster, McCollum, Bardwell, and McComb filed their petitions in the circuit court, stating that they were holders of divers classes of bonds, secured by the mortgages made upon its property by the Mississippi and Missouri Railroad Company, which had been foreclosed, and thus produced the fund then in the hands of the receiver, and asked to have their bonds paid out of that fund, alleging that the Mississippi and Missouri Railroad Company had no other property out of which their claims could be paid, denying that they had ever agreed to take less than the amount due on their bonds, and claiming a mortgage lien upon the fund to the exclusion of Howard *et als.*

Their claims to a lien upon the fund in court were founded

upon the facts that their bonds were secured by the mortgages which had been foreclosed, and the fund in court was a part of the proceeds of the foreclosure, and upon the legal principle that in distributing a fund in court, derived from the sale of property subject to different liens, a court of equity will respect the priorities of the lien-holders.

Codwise *et al.*, *vs.* Gelston *et al.*, 10 Johnson, 521.
Williams *et el.*, *vs.* Gibbes *et al.*, 17 Howard, 257.
Pennock *et al.*, *vs.* Coe, trustee, 23 Howard, 117.
Furness *vs.* The Railway Company, 27 Beavan, 358, which is directly to the point.

The petitions of Foster *et al.* will be found in full in the return to the mandamus, (pages 6 to 26,) and in the record in case No. 344, of the present term, (pp. 129 and 249 to 258,) and need not be repeated here, as the substance has been already stated in this brief.

The circuit court denied the prayer of the petitioners, but gave them leave to file their petitions, and required them to file a consolidated bill in that cause against all the other parties to the suit, at the next term of the court. (See the order of the court in full, on pages 28, 29, of the return to the mandamus, and pages 267, 268, of the record, in case No. 344, of this term,) already submitted to the court, upon a motion to dismiss the appeal.

The circuit court was of opinion that the petitioners had claims upon the fund in the hands of the receiver which ought to be paid, and it does not seem to us proper to review that action of the circuit court in so summary a manner as by a motion to dismiss the appeal.

This brings us to the record in this case. On the 5th day of July, 1869, Foster, McCollum, Bardwell, and McComb, filed their consolidated bill in the circuit court for the district of Iowa, against Mark Howard, and all the other parties to the original suit, setting up their claims as mortgage bondholders to the fund in question.

Their bonds amounted to about $72,000 of principal, with large arrears of interest, and they claimed a mortgage lien

upon the fund in preference to the claims of Howard *et als.*, and in the event of the court's holding they had no lien, then that they might be allowed, as general creditors, to share in the distribution of the fund. (Record, pages 1 to 8.)

All the defendants answered the bill (record, pages 11 to 21) denying generally the statements of fact made in it; denying that Foster *et al.* had any lien on the fund as mortgagees; denying their right to the fund as general creditors, because it was derived from a private sale of the railroad and its property, (although this court had decided, in 7 Wallace, 392, that made no difference as to the rights of creditors against the fund,) and insisting that Howard and others had a right, as a reward of their superior diligence, to be first paid out of the fund.

The defendants submitted to answer the bill generally, *and did not insist, by way of defence, that the proceedings were had in a cause after a final decree of the circuit court had been affirmed by this court.*

There is not in the whole record of the proceedings in this case, since the filing of the bill of Foster, McCollum, *et al.*, one word relating to the proceedings in Howard's case in this court, except a motion made on the 29th October, 1869, entitled in the original cause of Howard *et al. vs.* The City of Davenport *et al.*, to distribute the whole fund in court, pursuant to the mandate of the supreme court, notwithstanding the intervention of Foster *et al.* (Record, page 28.)

This motion was not disposed of until the final decree was entered, which appears on pages 131–137 of the record.

The circuit court rejected McCollum's claims *in toto.* They amounted, principal and interest, to about $100,000. It allowed Foster $9,898, Bardwell $6,718, and McComb $993 as general creditors only, denying them the benefit of any mortgage lein.

From this decree all parties prayed an appeal: McCollum, because he was not allowed anything; Foster, McComb, and Bardwell, because they were only allowed to come in as general creditors; Mark Howard and his associates, because Foster *et al.* were allowed anything at all; and Stanton, Elliott,

and Wilson, because they did not like the order that the receiver should proceed to collect the bonds, &c., and hold the proceeds, subject to the further order of the court. (Record, page 136.)

Foster, McCollum, Bardwell, and McComb are the only parties who prosecuted their appeals.

This is a full and accurate statement of the facts in all these cases, and shows clearly the nature of the motion to dismiss this appeal, and what effect its allowance will have upon the rights of the appellants.

There is no proof in the record that the bonds of Foster *et al.* have ever been paid, and it is admitted on all hands that the Mississippi and Missouri Railroad Company which issued them is utterly insolvent.

The appellants must get their pay out of this fund, or lose their debts, and we submit the following summary of our points and authorities, why the motion to dismiss this appeal should be denied, and also why no peremptory writ of mandamus should issue against the judges of the circuit court, requiring them to execute the original decree according to its terms, before the merits of the claims of Foster *et als.* are heard and determined.

I.

When the motion to dismiss an appeal is based upon reasons that require an examination into the merits of the cause, the motion should be denied, and the cause retained, and heard upon its merits.

Minor *vs.* Tillotson, 1 Howard, 287.

Day *et al.*, *vs.* Washburne *et al.*, 23 Howard, 309.

II.

The original bill filed by Howard and Weber was designed to reach the equitable assets of the Mississippi and Missouri Railroad Company, and other creditors had a right to come in

and establish their rights, and share in the fruits of the litigation. Fourteen others did come in before the final decree, but they did not obtain a preference over any others who might come in before the fund was distributed, for in all such cases, equality among creditors is equity.

Day *et al.*, *vs.* Wasburne *et al.*, 24 Howard, 352.
Wabash and Erie Canal Company *vs.* Boss, 2 Black, 448.
Ram. on Assets, 317 to 319.
Story's Equity Pleadings, by Redfield, §§ 99 to 106.

III.

Foster, McCollum, Bardwell, and McComb, as the owners of bonds secured by mortgages of the Mississippi and Missouri Railroad Company's property, which had been sold, and thus produced the fund in court, had a lien upon that fund superior to that of Howard and all his associates, who were only general creditors of the Mississippi and Missouri Railroad Company, some of them with judgments and some without, but none of them had a lien upon the fund in question, or had trusted the company on the faith of it.

Pennock *et al.*, *vs.* Coe, 23 Howard, 117.
Dunham *vs.* The Railway Company, 1 Wallace, 254.
Furness *vs.* The Caterham Railroad Company, 27 Beavan, 358.
2 Redfield on Railways, 510, 511.

IV.

So long as the fund realized from a sale of the mortgaged property was in the court which decreed the foreclosure, it was proper for the bondholders to appear and present their claims for payment, and it was according to the usual course of chancery practice, to allow them to do so.

Williams *et al.*, *vs.* Gibbes *et als.*, 17 Howard, 257, where most of the leading authorities are cited.

V.

"On an appeal from the court below, by which a mandate of the Supreme Court was construed and applied, this court will examine the mandate and the proceedings upon which it was founded, and determine whether it has been correctly construed by the circuit court."

Mitchell *vs.* The United States, 15 Peters, 52.

The Santa Maria, 10 Wheaton, 431.

VI.

Neither by their original bill and the decree of the circuit court, nor by the affirmance of that decree, did Howard *et al.* acquire a preference to payment out of the fund in question, as against the appellants; and, to determine that question, this court will look into the proceedings in that case, in order to ascertain the propriety of the action of the circuit court in allowing Foster *et als.* to intervene for the protection of their rights.

In the case of the Santa Maria, (10 Wheaton, 421,) after the decree of the circuit court had been affirmed in this court, and the mandate sent to the circuit court, new claims were presented, the circuit court rejected all the claims, and the defeated parties appealed to this court, where the appeal was heard upon its merits.

This court looked into the former record to see what had been decided, and then at the proceedings subsequent to the filing of the mandate, and finally allowed a claim that was presented after filing the mandate, and rejected the others.

So we insist that the court in this cause should look into the record of the case which was heard and decided, as appears in 7 Wallace, 392, and see what was really involved in that decision; and if it appears that the appellants were not parties to that suit, that they have claims upon the fund in controversy, which would have been allowed if they had been presented in the original proceeding, then upon the authority

of the cases cited from 10 Wheaton, 431, and 17 Howard, 257, the court should hear their case upon the merits, and not dispose of it in the summary manner of allowing motions to dismiss the appeal and for a peremptory writ of mandamus.

VII.

"The writ of mandamus is subject to the legal and equitable discretion of the court; it ought not to be issued in cases of doubtful right."

Life and Fire Insurance Co. *vs.* Wilson's Heirs, 8 Peters, 291.

Ex parte Taylor, 14 Howard, 12.

Postmaster General *vs.* Trigg, 11 Peters, 173.

SAMUEL W. FULLER,
For Appellants and Respondents.

WASHINGTON, *February* 9, 1870.

Supreme Court of the United States.

THE UNITED STATES on the relation of MARK HOWARD *et al.*,
vs.
THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA, respondents.

ARGUMENT OF MR. WITHROW FOR THE RESPONDENTS.

The statement of the case presented in the argument of Mr. Fuller renders any additional recital of facts unnecessary. In the consideration of the points and authorities which I propose to present to the court, the following propositions of fact are material:

1. The Mississippi and Missouri Railroad Company is insolvent, and has an existence only for the purpose of winding up its business.

2. It is claimed by Foster and his associates, that the fund now in the hands of the receiver is a part of the proceeds of a sale of the entire property of the company, in the foreclosure of mortgages executed to secure the payment of the bonds which they now hold; that they have a lien upon the fund, and are entitled to priority as against the relators in its distribution, and that it is the only fund out of which their claims can be paid.

3. The fund, at the time of the proceedings subsequent to the original decree, was and has ever since remained under the control of the court.

4. In the original petition of Foster it was made to appear to the Circuit Court, that if the fund should be distributed before the rights of the petitioner could be determined, it would

be scattered in such manner as to subject him, in any effort to recover it, to a multiplicity of actions; that a large portion of it would pass into the hands of persons of unknown responsibility, and that a considerable portion of it would be delivered to persons residing in foreign countries and be removed beyond the jurisdiction of the courts of the United States.

5. Foster and his associates have not sought to review, reverse or modify any decree of the Circuit Court or of this court, as between the original complainants and defendants; they desire no re-adjudication of any issues tried before the filing of their petition; they come in as new parties, asserting a lien upon the fund superior to the equities of both the complainants and defendants.

I.

Did the Circuit Court of the District of Iowa have the power to suspend the distribution of the fund by the receiver, until the claims of Foster and his associates could be heard and determined?

If this question is answered affirmatively, it disposes of the case now before the court; for if the power exists, its exercise will not be reviewed in this proceeding. If there was error only in the exercise of powers existing, that error must be corrected on appeal.

1. That a final decree will not be opened, vacated, modified, or its execution suspended, after the term at which it is entered, on the application of a party to the decree, is familiar law. That a final decree of the circuit court, affirmed by this court, is conclusive *between the parties upon all matters adjudicated,* is not questioned.

The array of authorities presented by the counsel for the relators establish these propositions, and these only, as an analysis of the facts in each will show.

In Miner *vs.* Woodbury, (7 Wis., 100,) a final decree was opened after it had been heard on appeal, upon the application of a party to the decree, for the purpose of taking addi-

tional testimony upon issues already adjudicated. No new party appeared in the case, and no new issue was tendered.

In Briscoe *vs.* Tucker, (16 Ark., 515,) the cause was tried *de novo* in the Supreme Court, the decree below reversed, and the cause remanded, with directions to enter a decree in accordance with the findings of the appellate court. After the mandate was filed, one of the original defendants was permitted to file an amended answer, setting up a defence which should have been presented by the original answer. The Supreme Court held that its decision was final and should be enforced.

In Ogden *vs.* Bowen, (4 Scam., 301,) permission was refused the original defendants to file new pleadings, setting up new defences to the plaintiff's cause of action, after the judgment of the Circuit Court had been reversed, and the cause remanded with directions; and this ruling was affirmed by the Supreme Court.

In Abrams *vs.* Lee, (14 Ill., 157,) after the decision of the Supreme Court in an action of account, one of the parties to the original action moved the Circuit Court to recommit to an auditor for a new statement of the account. It was held that the decision of the Supreme Court was final.

In Cammeron *vs.* McRoberts, (3 Wheat., 571,) this court held, that after the expiration of five years from the entry of a decree, the circuit court could not, on the application of an original party, set aside the decree, on the ground that when made the court had no jurisdiction.

In Brocket *vs.* Brocket, (2 How., 240,) it was held, that an appeal did not lie from an order refusing the application of one of the original parties to open a decree, such applications being addressed to the discretion of the court. It was also held that the court may suspend the operation of a final decree, and that the time within which a *supersedeas* must be filed commences to run from the day on which the decree becomes operative.

In McMichen *vs.* Perrin, (18 How., 510,) an original defendant petitioned the court to open the decree, because he had been deceived by the complainant, and for that reason

had failed to defend. This court held: 1. That such applications are addressed to the discretion of the court, and that no appeal lies from its decision; 2. That the court cannot, on motion, open a decree after the term at which it is entered.

Ex parte Sibbald (12 Pet., 488) is regarded as a leading case on this subject. It arose upon the application of Sibbald to reform the mandate which had been issued by the court. No new parties appeared in the case. The subject considered and discussed in the opinion of the court was the conclusive character of the decrees of the Supreme Court as to the parties, and the method of enforcing their execution. It holds that the final decree in chancery is conclusive of the rights of the parties thereby adjudicated, and cannot be reviewed at a term subsequent to the one at which it is rendered. There is nothing in the case indicating that the rights of those who were not parties are concluded, and any intimations to that effect would be utterly irrelevant to the questions before the court.

In Washington Bridge Company *vs.* Stewart *et al.*, (3 How., 413,) the original parties sought upon a second appeal to reverse the decree of this court upon the first appeal. It was held that a final decree of this court was conclusive upon the parties, and could not be reviewed.

In Chaires *et al.*, *vs.* The United States, (3 How., 611,) a petition was filed by the original parties, to reform a decree of the Superior Court of the Eastern District of Florida, after the same had been affirmed by this court, because of a mistake in the description of the lands which constituted the subject-matter of the decree. No new parties appeared. The petition was denied, upon the rule established in *ex parte* Sibbald, (12 Pet., 489.)

The Bank of the United States *vs.* Moss, *et al.*, (6 How., 36,) was an action in the Circuit Court of the United States for the district of Kentucky, on promissory notes. Trial; verdict for plaintiff; on which judgment was rendered. At a subsequent term, the original defendants moved the court to set aside the judgments, because the court had not jurisdiction, which motion was sustained. This court reversed the

ruling, holding: 1. That upon the face of the record jurisdiction should be presumed; 2. That at a subsequent term the judgment could not be set aside upon motion only.

In Southard *et al.*, *vs.* Russell, (16 How., 516,) the defendant, on the coming down of the mandate, directing the Circuit Court to enter a decree for the complainant, filed a bill of review, founded upon newly discovered evidence, a part of which was commulative in its character, and the remainder impeaching the testimony of a witness who testified on the original hearing. The Circuit Court dismissed the bill, and on an appeal to this court the decree was affirmed, upon principles so familiar, that it is not necessary to state them here.

This completes the examination of the cases cited by relators' counsel in his printed brief, submitted with his petition for the alternative writ, in support of his propositions touching this point. We do not question the rule which these cases establish: That the final decree of a court of chancery *is conclusive as between the parties as to all matters adjudicated.*

In the case at bar, it is sought, by the application of this rule, to conclude persons who were *not* parties as to issues which have *never* been adjudicated. In each of these cases the conclusive character of the decree has been sought to be avoided by persons who were parties to and were bound by the decree; in each an adjudication had upon issues tried has been assailed. In this case, Foster and his associates were not parties to, and were not bound by, the original decree; and they do not seek to avoid the final character of the decree, as an adjudication of the matters in dispute between the parties before the court. The Circuit Court held that the original complainants, as against the original defendants, were entitled to the fund. There was no adjudication as between the complainants and Foster and his associates, or as between the latter and the original defendants. When the Circuit Court declared that Howard and his co-complainants had an equity in the fund, superior to that of the city of Davenport and its co-defendants, it did not adjudge that they

also had an equity superior to that of Foster, who was not a party. Where in an action by A against B, respecting a fund, a court of equity decrees that A is entitled to the fund as against B, the decree cannot bind C, who was not a party. And while an adjudication between A and B, when affirmed be the court of last resort, is conclusive between A and B, touching all matters involved in the litigation, it is not conclusive as between either A and C, or B and C. May not C assert, in a proper proceeding, that while he does not question the decree, as an adjudication between A and B, he has equities superior to theirs? Does the decree in favor of A against B conclude C, who was not a party, as to liens that have never been considered or passed upon by the court?

Ordinarily we would not deem an examination of authorities bearing upon these propositions necessary, but the persistency with which it was in the court below, and in this court, urged that the original decree is conclusive upon the rights of Foster and others, admonishes us that such an examination cannot be improper.

Finley *vs.* The Bank of the United States, decided in 1826, and reported in 11 Wheaton, at page 301, is the earliest case we have been able to find in this country, in which a question analogous to this has been raised. The bank filed a bill to foreclose a mortgage, and a decree of foreclosure was entered, *with the consent of the defendant*, at the November term, 1822, of the Circuit Court of the United States for the District of Kentucky. A sale was made pursuant to this decree. Coleman, claiming under a prior mortgage of the same lands, filed his petition at a succeeding term, praying to be made a party defendant to the suit. His petition was dismissed, and Coleman appealed to this court, but his appeal was dismissed as irregular. The sale was affirmed by decree. After this *Finley, the defendant*, filed a petition, praying that the sale and decree be set aside, alleging, as one of the reasons, that the prior mortgagee, Coleman, had not been made a party to the bill. The prayer of the petition was rejected, and Finley appealed to this court. This decree was affirmed, Mr. Chief Justice MARSHALL declaring, that "to set aside a decree, com-

pletely executed, by a sale of the property, and payment of the purchase money, * * * would be a great inconvenience, * * * and, if admissible in any case, on which the court gives no opinion, it must be when mischief, resulting from a rejection of the petition, would be irremediable;" that this was not such a case, because the rights of the mortgagee were not impaired or extinguished by the decree to which he was not a party.

We do not cite this as a case holding affirmatively the proposition we endeavor to maintain. That, in a case in every respect weaker than the one at bar, there was no denial of the existence of the power, is significant. In that case the application was to set aside a sale, and open a decree; in this case we have not sought to set aside the decree, but prayed a suspension of the distribution of the fund in court, until we could be permitted to establish our superior right to payment out of it. In that case the application was made by the defendant, who had consented to the decree; in this case, the petitioners were not parties to,and were in nowise bound by, the decree. In that case, the application was made after the decree was fully executed; in this case, while the fund still remained in the hands of the court. In that case, a denial of the petition subjected the senior mortgagee to no prejudice; in this case, if the fund is distributed, the claimants must be subjected to a multiplicity of suits in many different States, a large portion of the fund will pass into the possession of persons of unknown responsibility, and a considerable portion will go to foreign countries, into the hands of persons who reside beyond the jurisdiction of the courts of the United States.

Gillespie *vs.* Alexander, (3 Russ., 130,) decided in 1827, was a suit instituted for the administration of the estate of General Gillespie. Upon two reports of the master, one certifying all debts proved, and the other the payment of the same, a decree was entered on the 25th day of January, 1825, reciting the payment of the debts, and ordering a distribution of the residue among the legatees. In November of the same year, one Lean, claiming to be a creditor of Gillespie, petitioned the court, "to be at liberty to go in and prove his debt," and an order was made accordingly. In the

meantime the fund had been apportioned, and some of the legatees had received their shares. The master of the rolls allowed the petition, and ordered that the debt be apportioned to the funds remaining in court. The principal ground of opposition to this order was strikingly similar to that now pressed by relator's counsel: The creditor was concluded by the decree ordering a distribution of the fund. On appeal, Lord ELDON said:

"Although the language of the decree, when an account of debts is directed, is that those who do not come in shall be excluded from the benefit of that decree, yet the course is to permitt a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without a remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back the fund, he may do so; but he cannot affect the legatees except by suit; and he cannot affect the executor at all."

It was finally ordered that the debt be apportioned to the shares of all the legatees, and that he should be paid the sums apportioned to the shares remaining in court, and remitted to his action against the legatees who had been paid.

In Greig *vs.* Somerville, (1 Russ. & M.,) determined in 1830, Lord LYNDHURST followed the ruling in Gillespie *vs.* Alexander, notwithstanding the decree was made in 1817, and the creditor did not come in until 1825, and during the intervening time had notice of the death of the debtor, and of the existence of the claim.

In 1833 these cases were followed in David *vs.* Frowd, (1 Mylne & Keene, 200.) An intestate's estate had been distributed under a decree in an administration suit, among persons found by the report to be his next of kin. The decree was entered, after public notice had been given, and every practicable step taken to bring in all the parties in interest. A person who was not a party to the proceeding in which the decree was entered was permitted to file a bill against the persons to whom the fund had been distributed under the decree. This was resisted, upon the ground that the defendants held the fund under an adjudication of a court. The answer, and

only answer given by the chancellor, was, the complainant was not a party to, and was not bound by the adjudication.

These cases were cited, approved, and followed by this court in the case of Williams *vs.* Gibbes *et al.*, (17 How., 239.) In 1816, an association called the Baltimore Company, was organized in Baltimore, for the purpose of furnishing advances and supplies in fitting out a military expedition, under General Mina, against Mexico, then a part of the dominions of the King of Spain. In 1819, Williams, one of the shareholders, became insolvent, and in 1825 his trustee, Winchester, sold and assigned his share to Oliver. The trustee had omitted to give bond or have the sale ratified, but these defects were subsequently cured by an act of the Maryland legislature. Williams died in 1836. In 1841, the trustees of Dennis A. Smith, one of the shareholders, filed a bill in equity, in the State court, against the parties alleged to be interested in the claim of Smith. The court ordered a notice to be published "requiring all persons interested in the claims of D. A. Smith and the Mexican Company, of Mexico, to present their vouchers, properly authenticated, on or before the 1st of January, 1824." On the 23d of January, 1842, Nathaniel Williams intervened as the permanent trustee of James Williams, appointed in the place of Winchester, who had made the assignment to Oliver. He claimed the proceeds of the share, on the ground that the assignment was irregular and void. In 1843 another notice was published, requiring "all persons having claims on the fund awarded to the Mexican Company to file their claims, with vouchers and proofs, on or before the 5th day of October, 1843, else they might be barred the benefit of the distribution of the fund."

In December, 1846, the court pronounced its decree, awarding, among other things, that *the proceeds of the Williams' share should be paid to the executors of the assignee, Oliver. An appeal was taken from this decree* to the court of appeals *of the State of Maryland, and in this respect the decree was affirmed.* In 1852 (six years after the entry of this decree) the administrator of Williams filed a bill in the superior court of Baltimore city, against the executors of the assignee, for the pro-

ceeds of the share of Williams. Asking the court to remember that there was a final decree affirmed on appeal to the court of last resort, adjudicating that the executors were entitled to the share, and that this decree was made after two notices published requiring all parties interested to come in, we call attention to the averments of the plaintiff's bill:

"That neither the said Williams, nor your orator, were ever present, or parties to, or in any manner bound by any proceeding, or order, or decree, had or passed in the aforesaid suit of Thomas White *vs.* Dennis Smith and others, in Baltimore County Court, as a court of equity, or in any appeal from the doings of said court to the court of appeals for the Western Shore of Maryland; and that anything done or enacted in either of said courts was transacted in the absence of said Williams and your orator; that the settlement and adjustment of the amount of the partnership funds of the said Mexican Company, and of the charges and commissions and costs to which they were liable *in solido*, and the distribution of the remainder of said fund by the decree of the court, with the several shares to which the members of said company were entitled, are in nowise binding upon, or even evidence against the said Williams or your orator."

The report of the case continues:

"The respondents answered the bill, setting forth various grounds of defence; *and particularly relying upon the decree of the Court of Appeals affirming the judgment of the County Court.*"

The forum was changed to the Circuit Court of the United States. The bill was dismissed, and the complainants appealed to this court. The decree below was reversed. From the opinion of the court, delivered by Mr. Justice NELSON, we extract the following touching the issues above set out:

"Now, the principle is well settled in respect to these proceedings in chancery for the distribution of a common fund among the several parties interested either on the application of the trustee of the fund, the executor, or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be excluded by a decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator, or in case they have distributed the fund in pursuance of an order of the court, against the distributees. (David *vs.* Frowd, 1 Mylne and Keene, 200; Greig *vs.* Somerville, 1 Russ., and M., 338; Gillespie *vs.* Alexander, 3 Russ., 130; Sawyer *vs.* Birchmore, 1 Keene, 391; Shrive *vs.* Gough, 1 Ball. & B., 436; Finlay *vs.* The Bank of the United States, 11 Wheat., 304; Story Eq. Pl., § 106; Wisewall *vs.* Sampson, 14 How., 52, 67.")

Extracts from the opinions of Sir JOHN LEACH, in David *vs.* Frowd, and of Lord ELDON, in Gillespie *vs.* Alexander, are set out, the court continuing:

"These principles are decisive of this branch of the case, as they establish beyond all controversy the right of the administrator to assert the title of Williams, the intestate, to the proceeds of the share in question, notwithstanding the decree of distribution by the Baltimore County Court. * * * *The cases above referred to relate to the rights of creditors and next of kin; but the principle is equally applicable to all parties interested in a common fund brought into a court of equity for distribution among several claimants.*

"It is worthy of observation in this connection, that the decree, however conclusive in its terms, in the distribution of the fund among the apparent owners then before the court, possesses no binding effect upon the rights of an absent party, whose interests have not been represented in the subject of litigation. The opinion of the court given, and the decree in pursuance thereof, applies only to the interests of those amongst whom the fund is distributed.

"These observations furnish an answer to the argument on behalf of appellees, drawn from a reference to the terms of the decree of the court of appeals of Maryland in this case, by which the fund is adjudged to the executors of Oliver. *As between all the parties then before the court, this adjudication was doubtless proper and conclusive upon their rights.*"

We will proceed no further with the citation of authorities in support of the proposition, that Foster and his associates were not concluded by the original decree entered in this cause, having a specific lien upon the fund in court prior in equity to that of the original complainants. That these allegations were made in the application to the court was sufficient. If such allegations presented a case to the court on which it could act, its action can be reviewed here on appeal only.

In one of the arguments submitted by the counsel for the relators, an attempt is made to dispose of the claim of Foster and his associates, as lien-holding creditors, by characterizing it as a "pretense of superior lien on the fund," which "is simply frivolous." If solemn averments of facts can thus be disposed of before issue is joined or evidence taken, the discovery will seem to very materially abridge proceedings in chancery. This is not the time to argue the truth of the allegations of the petition and consolidated bill. That will be done when we reach the appeal now pending from the decree of the Circuit Court upon the issues joined, and the evidence submitted on the hearing.

2. Relator's counsel rely, with much apparent confidence, upon the proposition, that Foster and his associates are general creditors only, and that by reason of their superior diligence they have acquired a superior lien upon the fund. As I have already argued, the question as to the rights of Foster and his associates as lien-holding creditors is one of fact, which cannot be determined in this case. The discussion, in the argument of Mr. Fuller, of the rights of the parties, upon the assumption that all are general creditors, under the authorities settling the law, is so complete, that I will not attempt to add anything thereto.

Some facts were disclosed by the record before the court below, where the action complained of was had, which, in my judgment, should be considered by the court, if it shall be deemed necessary to look into the equities existing between the parties; and these I will note as briefly as possible.

The original bill was filed on the 9th day of July, 1866, (the day on which the property of the Mississippi and Missouri Railroad Company was sold in foreclosure,) by Mark Howard and John Webber. They claimed as judgment creditors, and the aggregate of their claims allowed was $14,407 18. (Trans. in No. 344, p. 111.) On the 25th day of September, 1866, Joseph Young, by Grant & Smith, the solicitors of Howard and Webber, filed his bill praying to be made a co-plaintiff, and to be allowed to share in the distribution of the fund, upon the following claims:

1. Interest due on guarantied bonds of Muscatine city, $65,265, principal to become due January 1st, 1876, $97,000.

2. Principal and interest due on similar bonds of the city of Davenport, $8,425.

3. Interest due on similar bonds of Iowa city, $23,444, principal due January 1st, 1876, $35,000.

4. Interest due on similar bonds of Scott county, $17,000, principal due October 1st, 1868, $31,000.

5. Interest due on Muscatine county bonds, $36,676; principal due January 1st, 1874, $47,000.

6. An allegation that he is the owner of the bonds of like

character against the several municipal corporations above mentioned, amounting to $400,000.

On the 24th of October, 1867, George Bliss and others presented their petitions to the circuit court, alleging that they were the holders of bonds of the same classes, and of judgments for interest due, and praying to be allowed to come in and share in the distribution of the fund. They allege in this petition that "the complainants and defendants in the foregoing-entitled cause have permitted one Joseph Young, a creditor on the same footing with" themselves, "without judgment against the said railroad company, to become a co-complainant therein, and, since the last term of this court, to add the number and description of the bonds owned and held by the other creditors of said railroad company, with a view to sharing *pro rata* in the distribution of said fund, thereby delaying the bill in the foregoing-entitled cause, so as to include the several bonds of all those creditors who filed bills in this court to reach said fund, save and except the bonds of your petitioners, and also to include many bonds of other creditors, upon which no judgments were rendered, and upon which no bill was filed to reach said fund." (Trans., No. 344, p. 78.)

These allegations were not denied by Howard and Webber, but in their answer they say: "That the counsel of Howard and Webber and Young, having received valuable assistance from the counsel of Le Conte and Nesbit, and having made their allegations for relief large enough to include the claims held by him, did invite the said counsel to transfer their claims to Young, so as to include them in his decree, and this they not only had the legal right to do, so long as the fund was sufficient, but it was their moral duty so to do." (Trans., No. 344, p. 88.)

The court made an interlocutory decree, (Trans., No. 344, p. 86,) finding that the complainants and intervenors were entitled to the fund as creditors against the stockholders, appointing a master to state an account, and directing that the fund be paid into the hands of B. F. Allen, as receiver in the cause.

After the filing of the report, Douw, Lansing, Nesbit, and

others, also filed their petition to be allowed to share in the distribution. The petition was presented on the 13th day of May, 1868, and ordered to be filed as of the 3d day of October, 1867. This petition was filed by the counsel of Le Conte and Nesbit, for whose benefit the allegations of Young's petition were made "large enough to include the claims held by him." (Trans. No. 344, p. 79.)

On the 9th day of June, 1968, the final decree was entered, in which it was ordered that, after payment of costs and charges, the receiver shall "apportion the fund remaining in his hands among the several complainants and claimants joining with them herein, *pro rata*, in proportion of the amounts of their several claims ascertained by said master's report herein, both matured and not matured, and which said amounts are as follows, to wit. (Trans. No. 344, p. 111.)

We present the amounts allowed to each claimant, with an analysis of the same, compiled from the master's report:

To Mark Howard:		
Judgment against the city of Davenport and interest		$4,404 22
(Trans. No. 344, pp. 105, 111.)		
To John Webber:		
Judgment against the city of Davenport and interest		10,002 50
(Trans. same as above.)		
To Joseph Young:		
Amount of bonds not due, (Trans. No. 344, pp. 100–105)	$226,000 00	
Judgment and interest thereon	223,853 60	
Interest due on bonds	101,565 30	
Bonds due, (Trans. No. 344, p. 105)	11,000 00	
		562,418 90
To Clark Durant:		
Bonds not due	$18,000 00	
Interest due	3,157 65	
Judgments and interest	15,403 28	
		36,560 93
(Trans. No. 344, p. 96.)		

To Chas. W. Durant:

Bonds not due	$14,000 00	
Interest due on bonds	2,040 50	
Judgments	8,087 64	
		$24,128 14

(Trans. No. 344, p. 96.)

To Robert Murray:

Bonds not due	$6,000 00	
Interest due on bonds	1,041 96	
Judgments and interest	4,810 01	
		11,851 97

(Trans. No. 344, p. 96.)

To Henry Vandeveer:

Bonds and interest due	$2,1C9 04	
Judgments and interest	6,468 88	
		8,637 92

(Trans. No. 344, p. 96.)

To William Elliott:

Bonds not due	$6,000 00	
Interest due on bonds	762 00	
Judgments and interest	4,497 68	
		11,259 68

(Rec. No. 344, p. 96.)

To George Bliss:

Bonds not due	$4,000 00	
Interest due on bonds	471 28	
Judgment and interest due	33,166 04	
		37,637 32

To Betsy Tracy:

Bonds not due	$19,000 00	
Interest on bonds	2,484 06	
		21,984 06

(Trans. No. 344, p. 96.)

To Harriet Le Conte:

Bonds not due	$2,000 00	
Bonds and interest due	15,798 57	
Judgment and interest	3,520 18	
		21,318 75

(Trans. No. 344, p. 99.)

To Joseph W. Clark:

Bonds and interest not due	$6,500 00	
Bonds and interest due	3,558 12	
Judgments and interest	2,662 38	
		$12,720 50

(Trans. No. 344, p. 99.)

To Douw and Lansing:

Bonds and interest not due	$8,000 00	
Bonds and interest due	9,389 30	
Judgments and interest	6 404 78	
		23,794 08

(Trans. No. 344, p. 99.)

To Margaret J. Nesbit:

Bonds and coupons due	8,272 60

To Jared F. Harrison:

Bonds and interest not due	$8,000 00	
Bonds and interest due	6,522 48	
		14,522 48

(Trans. No. 344, p. 99.)

Total amount of claims allowed, $803,032 29.

Of these $323,280 were in the form of judgments, many of which, it is apparent from the record, were procured after the fund was brought into court. The simple contract debts amounted to $479,751 63 at the date of signing the decree. Of the entire amount allowed $487,009 81, was then due, leaving $316,022 48 not due.

Let it be remembered that these claims are founded upon contracts of guaranty, that the principal debtors are municipal corporations, and that the payment of the debts by the principal is now being enforced by this court, while Foster and his associates must be paid from this funds if they are paid at all. And again, the $316,022 48 not due may be paid by the principal at the date of its maturity. Upon what principle of justice or equity can Howard and Webber, having claims amounting to $14,406 77 against a fund amounting to $600,000 be permitted to parcel out to the other creditors the right to come in and share in its distribution, the consideration of

such arrangement being the "valuable assistance" which their counsel has received from the counsel of the favored claimants. We insist that to the facts in this case no rule can be applied which gives Young and the intervening complainants any superior equity upon claims not due to those of the bondholders, whose security by mortgage is now represented by this fand.

3. If the court shall be satisfied that Foster and his associates had a right to be heard upon their claim to share at the distribution of the fund, it only remains to examine the manner of, or form in, which relief should have been granted them; or, rather, was it competent to grant the relief in the manner adopted by the Circuit Court?

In this connection, it is important to remember, 1. That the fund was under the control of the court; 2. That to permit it to pass beyond its control was equivalent to a denial of relief.

The fund being in the hands of a receiver, no litigation could be had touching it without leave granted by the court. This court, in Wiswell *vs.* Sampson, (14 How., 65,) held a judicial sale of real estate, made under an execution to enforce a judgment at law, absolutely void, because the property, at the time of the sale, was in the possession of a receiver appointed in another cause.

In Brooks *vs.* Grethead, (1 J. & W.,) mortgaged property was placed in the hands of a receiver, on the application of a junior mortgagee. The senoir mortgagee filed his bill to foreclose his mortgage, omitting to make the junior mortgagee a party. Said the master of the rolls:

"When a party is prejudiced by having a receiver put in his way, the course has either been to permit him to be examined *pro interesse suo*, which may, perhaps, often be the most convenient mode. It would be extremely hard if the practice were different; the party would then be kept out of the possession, or if he proceeded at law, he would be liable to punishment for a contempt."

Upon the same point (see Gomme *vs.* West, 2 Dick., 472.) The practice obtains alike against receivers and sequestrators.

At the time of the filing of these petitions. the petitioners

could maintain no action with reference to the fund without leave of the court. The averments show that to wait until the fund was paid out by the receiver was to abandon all hope of relief. The court could give them relief only in the case the fund was held. The court had adjudged that as against defendants the complainants were entitled to the fund. It was then asked to hear parties who claimed equities superior or at least equal to complainants'. Inasmuch as the fund had been brought into court to be safely kept for those who should appear to be entitled thereto, it was but reasonable and proper that it should be kept there until the parties should be heard. This was done, and the court ordered that issues be joined between the parties touching the new claims, and that they be tried as other issues in chancery.

We believe that this practice was demanded by the circumstances of the case and the rights of all the parties. The case of Codwise and Gelston, (10 Johns, 507,) is in point. The commencement of the action was the filing of a creditor's bill by Codwise against Sands and others, to set aside certain conveyances of real estate and an assignment of a claim against the United States as fraudulent, and to apply the proceeds to the payment of debts. Gelston, a judgment creditor, was made a party, and it was alleged that his judgment was satisfied by the arrest and voluntary discharge of the judgment defendant. Issue was joined, and the court, upon the hearing, found for Gelston, but in the final decree made no provision for the payment of his judgment out of the fund which came into court under the decree ordering a sale of the property and the application of the proceeds to the payment of the debts. From this decree the defendant appealed. In May, 1809, Gelston presented his petition to the court, stating the judgment recovered by him against Sands, and alleging that it was a lien upon the lands which the court had ordered to be sold and the money to be brought into court. He prayed the payment of the judgment out of the proceeds, after satisfying all prior incumbrances. The consideration of this petition was deferred until the fund should be brought into court. On the appeal the decree below was substantially affirmed.

The petition of Gelston was then brought to a hearing and dismissed. On his appeal the decree dismissing the petition was reversed.

In the opinion of KENT, Ch. J., two questions were discussed: 1. Whether, without reference to the merits of his case, he was entitled to the relief sought by petition; 2. Whether or not upon the merits he was entitled to the benefit of the fund? Upon the first point it is said:

"The merits were discussed at large, both by the counsel and the court, and on account of the great consequence of the point, the chancellor said the case must be put in the form of a bill. *The mode of application depends very much upon the discretion of the court, and in this case I think it was well enough and suited to the object.* There is no well-founded objection to the mode, on account of any difficulty in settling the question of priority among the several judgments."

In discussing the second, the court continued:

"The court of chancery was bound to give his claim a legal priority. If a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in and avail themselves of it, the rule in equity then is that they shall be paid *pari passu*, or upon a footing of equality. * * * * * Instead, then, of dismissing his second petition, the court ought to have made provision for the payment of Gelston's judgment, out of the funds arising from the sales, under the order of June, 1804, in preference to the general creditors of lands. The moneys arising from those sales remain subject to the same liens that the lands did before the sales and the court, by a reference to a master, should have ascertained and settled the parity of liens, and decreed distribution accordingly."

II.

By the original decree it was adjudged that the "shareholders of the Mississippi and Missouri Railroad Company, who would be entitled to a distribution of said fund, according to the agreement of November 1st, 1865, * * * and who would have been entitled to said fund but for the claims of the creditors of the said Mississippi and Missouri Railroad Company, be, and they hereby are, subrogated to all the rights, claims, and remedies of the parties plaintiff respectively, in and upon each "of the judgments, coupons, and bonds paid by the application of the fund in the hands of the receiver;" and it is further ordered, that the receiver shall, upon the pay-

ment of the same, deliver to the lawfully constituted and authorized trustees or agents of said shareholders "the assignments, the judgments, and the coupons and bonds. None of the parties then before the court complained of this order; it was not made the ground of complaint or discussion on the appeal, and stands affirmed by the general decree of affirmance by this court.

In the decree made on the hearing of the consolidated bill, the order to the receiver was made more specific, directing him to proceed to collect the subrogated judgments, bonds, and coupons, and to report from time to time the amount in his hands, declaring that it should be applied to the payment of creditors, so long as any remained unsatisfied, and that when all creditors were paid it should be distributed to the shareholders.

It is now alleged that the original decree was reversed, without any application being made therefor. The consolidated bill contains a general prayer for relief. The complainants in that bill sought complete payment of their demands. Under the view of the court they were entitled only to share, as to a portion of their claims, with the original complainants and intervenors. The claims allowed the original and intervening claimants, as we have shown, amounted to over $800,000, and accrued interest. The fund in the hands of the receiver amounted to about $650,000. There not being sufficient money in the hands of the court to pay Foster and the other new parties the full amount found due, the court, under their general prayer, ordered that the subrogated fund should be applied in the payment of all balances remaining unsatisfied after the application of the money now held by the receiver.

If it was competent to give the new parties any relief, it was competent to give them this. And inasmuch as their sharing with the original parties in the fund now on hand reduced the shares which the original parties would have otherwise received, it was but equitable that they should be permitted to share with the new parties in the distribution of the subrogated fund. At all events, Mark Howard, John Webber,

and Joseph Young, with their intervening co-complainants, ought not to complain of a decree which provides for the payment in full of their demands, when under the decree which they now seek to enforce by *mandamus* they can receive but sixty per cent. These relators occupy the anomalous position of applicants for the exercise of all extraordinary power by this court to prevent the Circuit Court of the United States for the District of Iowa applying the corporate property of this bankrupt and defunct corporation to the payment of one hundred instead of sixty per centum of the claims.

This subrogated fund is corporate property, and as such is applicable to the payment of the corporate debts. The original decree evidently contemplated further deductions. Who are the lawfully constituted agents and trustees of the shareholders? The officers of the company, or the Stanton committee? And if it is claimed that the Stanton committee are the trustees or agents, who represent the non-assenting stockholders? Shall the receiver determine these questions at his peril? And if he cannot, shall the court, by further directions, determine them for him? It would be grossly inequitable to permit this fund, which is clearly a corporate fund, to be paid to the stockholders, while creditors are standing in the court asking that it be paid to them. Howard, who has seized a portion of the fund upon the theory that corporate property should be applied to the payment of corporate debts when the corporation is insolvent, now stands here resisting a like application made by Foster.

And then, if the court has power to make any order directing the receiver in the management of the fund, its action can be reviewed only on appeal.

III.

In conclusion, it is only necessary to repeat the principles of the law of mandamus established by this court, and applicable to the questions which arise in the case now before the court.

Mandamus will not lie where a party has a remedy by writ of error. The United States *vs.* Addison, (22 How., 174;) *Ex parte* Hoyt, (13 Pet., 238; 1 Pet., 567.) If a right is not clear the court will not grant the writ. The United States *vs.* The Bank of Alexandria, (1 Cranch, Cir. C., 7.) It lies where there is a refusal to perform a ministerial act, involving no exercise of judgment or discretion. It lies also where the exercise of judgment or discretion is involved, and the officer refuses to decide; provided, that if he decided, the injured party could have his decision reviewed by another tribunal.

Commissioner of Patents *vs.* Whiteley, 4 Wall., 534.

Ex parte Dubuque and Pacific Railroad Company (1 Wall., p. 72,) and *Ex parte* the Milwaukee Railroad Company (5 Wall., p. 826) relied upon by relator's counsel in the court below, are not in point. In each of these cases the judgment of the Circuit Court was reversed, and the cause remanded with directions. The parties in this Court were seeking in one case to vacate the judgment ordered by this Court, and in the other resisting the execution of the decree. This Court, in those cases, holding that its decree ended the controversy between the parties, commanding the Court below to proceed with its execution.

To recapitulate, we claim:

I.

1. That the original decree in Howard and others against the city of Davenport and others was conclusive only as between the parties before the court when it was made, as to the questions then determined; that it did not conclude the lien-holding creditors, who were not parties, and whose claims have never been considered.

Finley *vs.* The Bank of the United States, 11 Wheat., 301.

Gillespie *vs.* Alexander, 3 Russ., 130.

Greig *vs.* Somerville, 1 Russ. and M.

David *vs.* Frowd, 1 Mylne & Keen, 200.

Williams *vs.* Gibbes, 17 How., 239.

2. That, under the circumstances disclosed by the record, Young and the other intervening complainants are entitled to no priority on the ground of superior diligence, particularly as to claims not in judgment, and not due at the time the decree was made.

3. That the fund, being in the hands of a receiver, no action could be maintained with reference to it except by leave of the court; that the correct practice is to present to the court in the cause in which the fund is held a petition, setting out the grounds of claim, which the court may refer to a master, or direct issues to be made and tried in such manner as may be best suited to the circumstances of the case.

Thiswell *vs.* Sampson, 14 Howard, p. 65.
Brooks *vs.* Grethead, 1 J. & W.
Codwise *vs.* Gelston, 10 Johns., 507.

II.

The order in the last decree relating to the subrogated fund was within the scope of the prayer of the bill.

III.

The rules that a mandamus does not lie when a party has a remedy by a writ of error, or when the right is not clear, or to control the discretion of the court below, is applicable to this case.

The United States *vs.* Addison, 22 Howard, p. 174.
Ex parte Hoyt, 13 Peters, p. 238.
The United States *vs.* The Bank of Alexandria, 1 Cranch, C. C. R., p. 7.
Commissioner of Patents *vs.* Whiteley, 4 Wall., p. 534.

THO. F. WITHROW,
Of Counsel for the Respondents.

In the Supreme Court of the United States.

Ex Rel. MARK HOWARD, *et al.*,

vs.

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

December Term, 1869.

MOTION FOR A PEREMPTORY WRIT OF MANDAMUS.

POINTS IN OPPOSITION TO THE ISSUING OF THE WRIT.

July 9th, 1866, Howard and Weber filed their bill in equity in the circuit court of Iowa, to subject a certain fund belonging to the stockholders of the Mississippi and Missouri railroad, an insolvent corporation, (the sixteen per cent.,) to the payment of their debts as general creditors.

At various times during the progress of that suit, other parties, who claimed to be general creditors of the Mississippi and Missouri railroad, were allowed to become parties to that suit, and to share in the fruits of that litigation, as their rights and interests might appear.

May term, 1868, a decree was entered for the distribution of the fund in the hands of the receiver, amounting to about $552,320, *pro rata*, among the claimants and intervenors, whose claims amounted to about the sum of $802,032 38. This decree was appealed from and affirmed by this court, December term, 1868.

Foster, McCollum, Bardwell, and McComb, subsequently intervened in the same way. The claim of Foster was presented and filed in said circuit court before the case was heard on appeal in this court.

November 8, 1869, the circuit court decreed that the claim of Foster upon said fund should be allowed to the amount of $10,000; that the claim of Bardwell and McComb to a part of said fund be allowed; that the claim of McCollum be disallowed; and a decree was entered apportioning the fund among the complainants severally, together with Foster, Bardwell, and McComb. From that decree several of the parties have appealed, which appeal is now pending.

It will be necessary for this court, before granting peremptory mandamus in this case, as I apprehend, to decide either that Foster, Bardwell, McComb, and McCollum have neither of them any right to share in the fund in controversy, or that whatever may be their rights to a share of the fund, and even if they have a right to said fund, better and prior in equity to the general creditors of the Mississippi and Missouri railroad, yet the position of this case is now such that their rights cannot be considered by the court.

If it be held that these subsequent parties have no rights to any portion of the fund, it can only be upon the ground that the original complainants, by their diligence, have acquired a superior right to the fund.

In reply to this proposition, I submit that the law of Iowa having provided that no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless made for the benefit of all his creditors in proportion to the amount of their respective claims; the principle of the law is that a court of equity will apportion the assets of the insolvent in the same manner, and no preference will be obtained by superior diligence while the fund is actually within the control of the court. (Lee *et al. vs.* Atwood *et al.*, 2 Stuart, 184.)

2. That the assets of the Mississippi and Missouri Railroad Company sought to be subjected to the payment of these

claims are equitable assets, and in this case chancery will distribute this fund among all the creditors *pro rata.* (Day *vs.* Washburne *et al.*, 24 Howard, 354.)

3. That the whole matter in controversy, including the question whether the complainants have obtained superior rights to the fund by their diligence, was adjudicated in this case by the circuit court of Iowa and between these parties, and that decree has been appealed from, and the case is now pending in this court, and upon the hearing of that case the parties have a perfect remedy if injustice has been done in the decree; but there is a valid and subsisting decree which the circuit court had jurisdiction to make, and to which all the parties in interest are parties, that must be rendered void if the writ prayed for in this case be allowed.

4. The subsequent intervenors claim a superior right to the fund over those complainants who are only general creditors of the Mississippi and Missouri Railroad Company, as being holders of bonds secured by mortgage. This is one of the questions to be tried by this court on the appeal, and if decided in favor of the claimants, is a full answer to the claim that the superior diligence of complainants has given them an exclusive right to the fund.

I think if there had been no appeal in the original case, and no mandate sent down from this court in that case, it would hardly have been claimed that this court would grant a mandamus to the circuit court to set aside its subsequent decree and to carry the original decree into execution; and if this be so, the question only remains in what manner has that mandate changed the rights of those who were not parties to the suit in which it was issued.

II. If the parties who have intervened in this cause have a right to some portion of the fund in controversy, is there anything in the present position of the cause that will prevent them from asserting those rights; in other words, must the circuit court of Iowa refuse to entertain the claim of these parties for the reason that the cause has been appealed to this court, the decree affirmed, and a mandate sent down to the circuit court which makes it obligatory upon that court to

execute the original decree and distribute the entire fund upon the parties to that decree, no matter what claim the subsequent parties may have to share in such distribution. The mandate from this court did not command the circuit court to execute the decree so affirmed, but commanded the circuit court that "such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to have the said appeal notwithstanding."

The meaning of this mandate is, that the circuit court should execute the decree in the same manner and to the same extent as if no appeal had been taken. Any action in the cause, according to the laws of the United States, whether such action be the distribution of the fund between the complainants in the case, or between them and subsequent intervenors who may have presented and substantiated their claims according to law, is a literal execution of the mandate.

If the circuit court was of opinion that right and justice and the laws of the United States required that the claims of Foster, Bardwell, McComb and McCollum, or either of them, should be allowed and enforced in the further proceedings in the cause, then the subsequent decree of said court allowing such claims was the legitimate mode of executing the mandate of this court, and it necessarily follows that a mandamus will not be allowed as prayed for in this case unless a mandamus would be allowed to set aside the decree of the circuit court allowing a part of the claims of Foster, Bardwell and McComb, because a mandamus requiring the fund to be distributed among the complainants only, does render that decree wholly inoperative and void.

A mandamus will not be issued to revise or set aside any judicial determination; it will only lie to enforce the performance of a purely ministerial act. (People *vs.* Hepburn, 22 Cal., 34.) If, then, the circuit court had a right to pass upon and determine the right of Foster and others to share in this fund at the time it did so pass upon them, whether that determination was right or wrong, that determination cannot be set aside by mandamus.

Regina *vs.* Manwaring, 1 Ellis B. & E., 474.

Anderson County Court *vs.* Stone, 18 B. Monr. Ky., 423.

A writ of mandamus cannot be made to perform the office of a writ of error or appeal.

State *vs.* Taylor, 19 Wis., 560.

Bleeker *vs.* St. Louis Tax Commissioner, 30 Mis., 111.

A mandamus will not lie to an inferior court to issue execution upon a judgment which it has partially set aside.

Wilson *vs.* Moore, 2 Dutch., 458.

III. The real question is, have these subsequent parties any claim to any portion of the fund in controversy which they have a right to have litigated in the ordinary manner? If they have, as they claim, a superior right to this fund over that of the complainants, or if they have, as the circuit court of Iowa found, an equal right to share in that fund *pro rata*, as general creditors of the Mississippi and Missouri Railroad Company, then, while that fund remains in the hands of the officer of the court, they have a right to prefer their claim, and, even after it has been distributed, to claim contributions of those who have withdrawn it from court.

Williams *vs.* Gibbs, *et al.*, 17 How., 254, 257.

Wiswell *vs.* Simpson, 14 How., 52, 56.

Codwise *vs.* Gelston, 10 Johnson, 521.

If Foster and the other intervenors have a right to prefer their claims to share in this fund while it remained in court, it seems clear that such right could not be changed by the appeal or mandate, or by any proceeding to which they were not parties, upon the plain and universally-conceded principle, that before any man's right can be concluded by a judicial proceeding he must have had his day in court.

Unless the relators in this cause are entitled to have the whole fund in controversy distributed among themselves, to the entire exclusion of Foster, Bardwell and McComb, whose claims to share in that fund, to a certain extent, have been established by the decree of the circuit court of Iowa, then this application for a mandamus must be denied, because this is what is claimed in the alternative writ, which stands as the pleading of the party; and the rule is too well settled to re-

quire argument, that the peremptory writ must follow the alternative writ; it cannot be broader or narrower; can claim no other or different relief, and the relator must show himself entitled to the entire remedy claimed in the alternative writ, or his application must be denied.

State *vs.* County Judge, 12 Iowa, 237.
People *vs.* Hatch, 33 Ill. Reps., 269.
Moses on Mandamus, 204.
People *vs.* Baker, 35 Barle, N. Y., 105.

Will this court, by mandamus, set aside the decree of the circuit court in relation to these claims, and in this summary proceeding determine the rights of parties who have had no opportunity of being heard in the case?

B. C. Cook,
Of Counsel for Respondents.

In the Circuit Court of the U. S.,

DISTRICT OF IOWA.

MARK HOWARD AND JOHN WEBBER,

VERSUS

THE CITY OF DAVENPORT, THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY, THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, GEORGE W. STANTON, JR., JOHN ELLIOTT, AND BLAKELY WILSON.

AMENDMENT OF

JOHN V. McCOLLUM,

TO

CONSOLIDATED BILL OF

FREDERICK A. FOSTER, JOHN V. McCOLLUM, J. BARDWELL, AND H. S. McCOMB.

WITHROW & WRIGHT,

WITH

SCAMMON, McCAGG & FULLER,

Solicitors for John V. McCollum.

MILLS & CO., Print, Des Moines, Iowa.

In the Circuit Court of the United States:

DISTRICT OF IOWA.

MARK HOWARD AND JOHN WEBBER

vs.

THE CITY OF DAVENPORT, THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY: THE CHICAGO AND ROCK ISLAND RAILROAD COMPANY. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY: GEORGE W. STANTON, JR.: JOHN ELLIOTT, AND BLAKELY WILSON, *Defendants.*

Amendment to Petitioners' Consolidated Bill.

To the Judges of the Circuit Court of the United States, for the District of Iowa:

Your orator, John V. McCollum, for amendment to the consolidated bill hereinbefore filed by your orator, and Frederick A. Foster, J. Bardwell and H. S. McComb, withdraws from said consolidated bill the paragraphs setting out the numbers and otherwise describing the bonds and coupons owned by your orator, and in the place of the allegations set out in said paragraphs so withdrawn, substitutes the following, to wit:

And your orator, John V. McCollum, represents that he is the owner and holder of the Construction Bonds of the Mississippi and Missouri Railroad Company, numbered 421, 423, 592, 778, 1453, 1905, 2531, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2747, each thereof being for the sum of one thousand dollars, with the interest coupons appended to said bonds numbered from sixteen to forty inclusive: Also of the Second Mortgage Construction Bonds of said Company, numbered 592 and 778, each for the sum of Five Hundred Dollars; with the interest coupons appended thereto, numbered from seven to forty inclusive; also of the Income Bonds of said Company numbered 148, 152, 153, 154, 155, 156, 157, 158, 200, 235, 236, 237, 238, 240, 252, and those numbered from 159 to 198, both inclusive, each for the sum of One Thousand Dollars, with all

of the interest coupons appended thereto, being all of the coupons excepting the first one maturing after the date of said bonds: That he is also the owner and holder of other coupons than those attached to the bonds above described, and which were attached to the Construction Bonds of said Mississippi and Missouri Railroad Company, which are all past due and wholly unpaid; that said coupons, so owned by him, the numbers of the coupons, and the number of the bonds from which they were detached, are as follows:

Number of Coupons owned.	Their Number.	Number of the Bonds from which they were detached,
50	15	2658 to 2707 both inclusive.
38	15	2908 " 2945 " "
55	15	2946 " 3000 " "
36	15	3001 " 3036 " "
64	15	3037 " 3100 " "
15	15	3101 " 3115 " "
96	15	3116 " 3211 " "
78	15	3212 " 3290 " "
79	15	3291 " 3370 " "
7	15	3371 " 3377 " "
33	15	3378 " 3400 " "
57	15	3401 " 3457 " "
50	15	4051 " 4100 " "
50	15	4101 " 4150 " "
50	15	4151 " 4200 " "
50	15	4201 " 4250 " "
800		

That no part of said bonds and coupons have been paid; that neither he nor any other person or corporation in his behalf has ever made, assented or agreed to the arrangement or agreement hereinbefore recited, for the payment of said bonds and coupons by the payment of a less sum than that due upon the face thereof, and that he is now entitled to be paid the full amount stipulated to be paid on the face of said bonds and matured coupons.

And your orator further shows, that the following coupons, viz: one coupon detached from bond numbered 3397; fifty coupons detached from bonds numbered 4051 to 4100 both inclusive; fifty coupons detached from bonds numbered 4101 to 4150 both inclusive; fifty coupons detached from bonds numbered 4152 to 4200 both inclusive; fifty coupons detached from bonds numbered 4201 to 4250 both inclusive, were by mistake not signed by the Secretary of said Railroad Company; but your orator alleges that said coupons and each of them were attached to valid and duly executed Construction Bonds of said Railroad Company, of which Exhibit A. of said Consolidated Bill is a copy; that the bonds from which said coupons were detached had been duly executed, and were at the time said

coupons were detached therefrom valid, unpaid, outstanding bonds of said Railroad Company; and that said coupons have not, neither has any part thereof been paid.

And your orator re-alleges all of the allegations set out and contained in said Consolidated Bill, with the exception of those contained in the paragraphs first above mentioned; the purpose of this amendment being to incorporate in said bill the paragraphs last above set out in the place of those withdrawn from said bill.

And your orator repeats the prayer for relief set out in the original Consolidated Bill.

WITHROW & WRIGHT,

WITH

SCAMMON, McCAGG & FULLER.

Solicitors for JOHN V. McCULLOM.

Master Howard's Exhibit D

In the Circuit Court of the U. S.,

DISTRICT OF IOWA.

MARK HOWARD AND JOHN WEBBER,

VERSUS

THE CITY OF DAVENPORT, THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY, THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, GEORGE W. STANTON, JR., JOHN ELLIOTT, AND BLAKELY WILSON.

DECREE ON THE HEARING

OF THE

CONSOLIDATED BILL OF

FREDERICK A. FOSTER, JOHN V. McCOLLUM, J. BARDWELL, AND H. S. McCOMB.

MILLS & CO., Print., Des Moines, Iowa

United States of America.

DISTRICT OF IOWA, SS.

AT A TERM OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SAID DISTRICT, BEGUN AND HOLDEN AT DES MOINES, ON THE THIRD TUESDAY, IT BEING THE 19th DAY OF OCTOBER, A. D. 1869.

Present, HON. J. M. LOVE, District Judge.

MARK HOWARD, and others,
against
THE CITY OF DAVENPORT, and others; } *No. 69, Chancery. Original Bill.*

and

FREDERICK A. FOSTER,
JOHN V. McCOLLUM,
J. BARDWELL, and
H. S. McCOMB,
against
MARK HOWARD, AND OTHERS COMPLAINANTS AND DEFENDANTS IN SAID ORIGINAL BILL. } *Consolidated Cross Bill.*

This cause coming on to be heard at this term, to wit: on the eighth day of November, A. D., 1869, upon the consolidated bill of Frederick A. Foster, John V. McCollum, J. Bardwell and H. S. McComb, and the amendment thereto of John V. McCollum, the answers thereto of Mark Howard and original complainants in the original bill, John Webber, Joseph Young, Clark Durant, Charles

W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Margaret I. Nisbet, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing and Jared F. Harrison, intervening complainants in said above entitled cause, and the Mississippi and Missouri Railroad Company, George W. Stanton, Jr., John Elliott and Blakely Wilson, and The Chicago, Rock Island and Pacific Railroad Company, defendants to said original bill in said cause, all of whom are defendants to said consolidated bill, and the replications of said complainants in said consolidated bill to said answers, and upon the motion of all of said defendants to said consolidated bill, except the Chicago, Rock Island and Pacific Railroad Company, for an order directing the Receiver to distribute the fund now held by him in this cause according to the directions of the original decree herein: and thereupon the parties having appeared by their solicitors, and the court having inspected the record and heard the evidence and the arguments of counsel, and being fully advised in respect thereto, doth order, adjudge and decree as follows, to wit:

That the complainant, John V. McCollum, is not entitled to the payment of any portion of the bonds and coupons in said consolidated bill and the amendment thereto described, or to any portion of the same, out of the funds now in the hands of the Receiver in this cause; and that the said consolidated bill, as to the said John V. McCollum, be, and is dismissed without prejudice to his rights to recover on said bonds and coupons against the defendant, The Chicago, Rock Island and Pacific Railroad Company, or other persons.

That the said Frederick A. Foster, J. Bardwell and H S. McComb are severally and respectively entitled to share in the said fund in the hands of the Receiver, upon the basis and to the extent hereinafter provided, and no other, to wit: That they and each of them are entitled to *pro rata* shares or dividends of the said fund, or the proceeds thereof, on an equal footing with complainants and other creditors joining with them in the said original bill as provided by the said decree therein, to wit: as general creditors of the Mississippi and Missouri Railroad Company, and in proportion to the amounts which were due them respectively upon the bonds

coupons and scrip, as set forth in said cross bill, at the date of the Master's report in the said original cause, to wit: the first day of March A. D. 1868. That said amounts are to be ascertained in manner following, to wit:

As to the claim of said Frederick A. Foster, by adding to the principal sum of said bonds held by him, to wit: the sum of ten thousand dollars, the amount of the coupons thereon held by him and matured prior to July 9th, 1866, the date of said sale on foreclosure in said cross bill mentioned, with interest on said coupons from the maturity thereof respectively, at seven per cent per annum, down to the said 9th day of July 1866, by then substracting from said aggregate amount the *pro rata* proportion of the proceeds of said foreclosure sale properly applicable to the payment of the said Foster's bonds, to wit: twenty per centum of the amount then due thereon; and by then adding to, the remainder thus produced interest at the rate of seven per centum per annum from the 9th day of July A. D., 1866 to said first day of March, A. D. 1868.

That the amount so due to the said J. Bardwell on the said first day of March, 1868, is to be ascertained so far as the same grows out of the said First Mortgage Construction Bonds and Income Bonds held by him as alleged in said cross bill, in the same manner and by the same rule precisely as is hereinbefore provided in respect to the claim of said Frederick A. Foster, and so far as the same grows out of said Second Mortgage Construction Bond, held by him as alleged in said cross bill, in the same manner and by the said rule as is hereinbefore provided in respect to his said other bonds, except that no deduction is to be made on account of said proceeds of said foreclosure sale, no part of said proceeds being applicable to said Second Mortgage Construction Bonds.

That the amount due to said H. S. McComb is to be ascertained in the same manner and by the same rule as hereinbefore provided in respect to said Frederick A. Foster, except that no deduction is to be made on account of proceeds of said foreclosure sale, no part thereof being applicable to said McComb's claim.

And it is further ordered, adjudged and decreed, that the Receiver

herein, from the funds now in his hands and held under the former decree in this cause, first pay and satisfy the costs of all the parties to the said consolidated bill, as well as the parties to the original bill, together with his own costs and charges in the execution of said original decree and of this decree, to be settled and allowed bythe court or a judge thereof; that after the payment of said costs and charges he shall apportion the fund remaining in his hands among the said several original and intervening complainants and the said Frederick A. Foster, J. Bardwell and H. S. McComb *pro rata* in proportion to the amounts of the said claims, as ascertained in the original decree herein and by this decree, including as to the claims of the parties to the original decree those matured and not matured, and which said amounts are as follows, to wit:

To Mark Howard, the sum of four thousand four hundred and and four $\frac{22}{100}$ dollars ($4,404.22.)

To John Webber, the sum of ten thousand and two $\frac{59}{100}$ dollars ($10,002.59.)

To Joseph Young, the sum of five hundred and sixty-two thousand four hundred and twenty-eight $\frac{90}{100}$ dollars ($562,428.90.)

To Clark Durant, the sum of thirty-six thousand five hundred and sixty $\frac{93}{100}$ dollars ($36,560.93.)

To Charles W. Durant, the sum of twenty-four thousand one hundred and twenty-eight $\frac{14}{100}$ dollars ($24,128.14.)

To Robert Murray, the sum of eleven thousand eight hundred and fifty-one $\frac{97}{100}$ dollars ($11,851 97.)

To Henry Vanderveer, the sum of eight thousand six hundred and thirty-seven $\frac{42}{100}$ dollars ($8,637.42.)

To William Elliott, the sum of eleven thousand two hundred and thirty-nine $\frac{70}{100}$ dollars ($11,239.70.)

To George Bliss, the sum of thirty-eight thousand one hundred and sixty-six $\frac{04}{100}$ dollars ($38,166.04.)

To Betsey Tracy, the sum of twenty-one thousand nine hundred and eighty-four and $\frac{06}{100}$ dollars ($21,934.06.)

To Harriet LeConte, the sum of twenty-one thousand three hundred and eighteen $\frac{75}{100}$ dollars ($21,318 75.)

To Joseph W. Clark, the sum of twelve thousand and twenty $\frac{50}{100}$ dollars ($12,720.50.)

To Volkert P. Douw and Christopher Y. Lansing, the sum of fifteen thousand seven hundred and ninety-four $\frac{08}{100}$ dollars ($15,794.08.)

To Margaret I. Nisbet, the sum of eight thousand two hundred and seventy-two $\frac{60}{100}$ dollars ($8,272.60.)

To Jared F. Harrison, the sum of fourteen thousand five hundred and twenty-two $\frac{48}{100}$ dollars ($14,522.48.)

To Frederick A. Foster, the sum of nine thousand eight hundred and ninety-eight dollars ($9,898.)

J. Bardwell the sum of six thousand seven hundred and eighteen dollars ($6,718.)

To H. S. McComb the sum of nine hundred and ninety-three dollars ($993.)

That from said fund so apportioned and set apart to each of said parties the said Receiver shall first pay to said party, his representatives or assigns, in full (so far as the fund so set apart to him will go,) the amount of his claim now matured and due (the maturity of the claims of the original parties in said cause to be ascertained from the Master's report herein) together with any additional amount which shall have matured and become due at the time of such payment, in the following order, viz:

He shall first pay in full, or so far as such fund will go, any judgment or judgments of such party, if any; out of the remainder of such money, if any, he shall next pay in full, or so far as such money will go, any and all coupons which are due on the bonds held by such party; and out of the remainder of such moneys, if any, he shall next pay in full, or so far as such fund will go, the principal of any bond or bonds which are matured and due, and in case the amount of such matured bonds exceed the sum so applicable to their payment, then he shall pay in full such part of said bonds as said sum shall be sufficient to pay, and the remainder of the fund so apportioned and set apart to each of said parties shall in like manner be applied from time to time by said Receiver to the payment of such party of the amounts which shall thereafter become due and remain unpaid for either interest or principal, on

his or her respective claims, as and when the same shall fall due; and the said Receiver shall apply the said remainder of said sum so set apart and appropriated to any of said parties who shall consent to receive the same in payment and satisfaction, so far as the same will go, of the principal sum or sums secured to be paid by guaranteed bonds held by them respectively though not yet matured, they rebating all future interest thereon to the extent of such payments; that before such payments are made each of said parties shall produce and deliver to the Receiver a written statement, certified by the clerk of the court to be correct, of the parties, date, and amount of each judgment of which he claims payment; and shall also produce and deliver to the Receiver all coupons and bonds which are due and which may be paid in full, together with a receipt for such payment, and shall deliver to him a receipt stating the amount which is paid on any judgment, bond or coupon, which may be paid only in part, describing the same so that it may be identified; and in case of partial payment, when made the Receiver shall indorse upon the bond a statement of the amount so paid by him, and that the same was paid from funds in his hands as Receiver, and all bonds and coupons shall be produced to him for such indorsement before such payment shall be made thereon, and the Receiver shall file with the clerk of the court in which the judgment so paid in part is entered, a statement of the amount so paid thereon, and that the same was paid from funds in his hands as Receiver, which statement shall by said clerk be filed and preserved among the papers in the cause.

And it is further adjudged and decreed, that after the said distribution the Receiver shall proceed to collect from the principal debtors in said judgments on guaranteed bonds and coupons, and such bonds and coupons not in judgment, as shall have been delivered to him in accordance with the provisions of this decree, the full amount of such debt as against such principals and each of them, and shall at each term of this court report to the court the amount of moneys in his hands so collected, and shall hold the same subject to further distribution, under the order of the court, to the creditors of the Mississippi and Missouri Railroad Company, and of the surplus thereof, if any remain after the payment of the creditors, to the stockholders of said Mississippi and Missouri Railroad Company.

And it is further ordered, adjudged and decreed that the shareholders of the Mississippi and Missouri Railroad Company, who would be entitled to the distribution of said fund according to the agreement of November first, 1865, and subsequent agreements between the stockholders and bondholders of the Mississippi and Missouri Railroad Company and the said Stanton, Elliott and Wilson, and who would have been entitled to said fund but for the claims of the creditors of the Mississippi and Missouri Railroad Company, be and they are hereby subrogated, subject to the foregoing provisions of this decree, to all the rights, claims and remedies of the parties plaintiff respectively, in and upon each and all of said judgments, coupons and bonds, as and when the same shall be so paid in full against the municipal corporations which are the principal debtors on such bonds and judgments; that such judgments shall remain in full force and effect against such corporations for the benefit of said shareholders, who may enforce the collection of the same in the name of the plaintiffs therein or otherwise, but at their own costs and charges, by any process, remedy or proceeding which said plaintiffs might have had for their own benefit; that any and all proceedings which might have been instituted by any of said parties for the collection of said demands shall remain and enure to the benefit of the Receiver herein for the use of the parties entitled to this fund, and to this end the original and intervening complainants respectively, on the payment of such judgments by the Receiver, shall execute, acknowledge and deliver to him an assignment of each judgment so paid, and the Receiver shall on the payment of the several demands herein ordered to be paid to the complainants and intervenors and the said Foster, Bardwell and McComb, deliver under the order of the court to said shareholders, or to their lawfully constituted and authorized trustees or agents, such assignments of said judgments, and shall also deliver to them all coupons and bonds which shall have been paid in full as above directed.

And it is further ordered, adjudged and decreed, that if after payment in full to any of said parties by said Receiver, of all sums which said party shall be entitled to have paid him out of said funds according to the directions hereinbefore given, there shall remain in

said Receiver's hands any portion or residue of the proportion of said funds set apart and apportioned to said party as hereinbefore directed, the same shall be reported by said Receiver to the court and held subject to such further order and direction as may be made by the court in respect to the disposition thereof.

It is ordered, adjudged and decreed, that the Receiver do proceed to distribute according to the terms of this decree, the funds now in his hands as follows: he shall as soon as practicable notify each of the parties entitled to share in the distribution of said fund of the amount of his or her dividend of the same, and of the amount of money in his hands applicable to the payment of the same; the party entitled thereto may elect to take payment of the balance thereof in the bonds of the Chicago, Rock Island and Pacific Railroad Company, constituting a portion of the fund in the hands of the Receiver, at the current market price of said bonds at the stock exchange in the city of New York, on a day to be fixed by the Receiver, with the approval of a judge of this court, and with reference to the best interest of all the parties concerned; and if there shall not be sufficient money in the hands of the Receiver to pay all of said dividends and all the parties entitled thereto shall not elect to receive bonds for the balance as above provided, the Receiver shall proceed to realize the sum necessary to pay said dividend by converting enough of said bonds held by him into money, by the sale thereof at public sale, at the stock exchange in the city of New York, at not less than the current market price of said bonds at said stock exchange, at such time as said Receiver may think proper for the best interests of the parties concerned; but before any such sale the said Receiver must first notify the parties, their agents or attorneys, of the time of such sales, and the amount to be put in the market at any one time, and shall also give five days' public notice of said sale in a daily paper published in the city of New York.

Provided, that no repetition herein contained of the matters adjudicated in the said original decree shall be taken or construed as a re-adjudication thereof as between the parties to said original decree; which said decree is to be regarded as continuing in full force and virtue, except so far as modified hereby so as to provide for the payment of the claims of said Foster, Bardwell and McComb

equally with the original complainants and intervenors, and all the full amount of their respective claims as hereinbefore provided.

And thereupon the complainants in said consolidated bill, John V. McCollum, Frederick A. Foster, J. Bardwell and H. S. McComb, and the defendant, The Chicago, Rock Island and Pacific Railroad Company, by their several solicitors each pray an appeal from this decree to the Supreme Court of the United States, and it is allowed them, or either or any of them, on their giving bonds with sureties in the penal sum of five hundred dollars as provided by law for the costs of the appeal: Provided, that in order to supercede and stay execution of said decree pending such appeal, one or more of the appellants shall give bond with sureties conditioned and to be approved as provided by law, in the penal sum of seven hundred thousand dollars.

And the said Mark Howard, John Webber, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, Margaret I. Nisbet, and Jared F. Harrison pray an appeal to the Supreme Court of the United States from so much of said decree as awards any part of the fund in controversy to said Frederick A. Foster, J. Bardwell, and H. S. McComb, and it is allowed them on their giving bond as provided by law in the sum of five hundred dollars.

And the said George W. Stanton, Jr., John Elliott and Blakely Wilson pray an appeal from so much of said decree as awards any part of said fund to said Foster, Bardwell and McComb, and also from so much of said decree as provides that the said Receiver shall proceed to collect the bonds coupons and judgments which are to be delivered or assigned to him by the complainants and intervening creditors, and hold the same subject to such further distribution, under the order of the court, to the creditors of The Mississippi and Missouri Railroad Company, and their appeal is allowed on their giving bond as provided by law in the penal sum of five hundred dollars.

J. M. LOVE, *Judge.*

Eduardo Howard

Letters

Copy of papers for the court

Petition for mandamus

Supreme Court of the United States.

DECEMBER TERM, 1869.

EX PARTE
MARK HOWARD ET ALS.

Now come Mark Howard, John Weber, Joseph Young Clark Durant, Chas. W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet L. Conte, Joseph W. Clark, Volkert P. Dow, Christopher Y. Lansing, Margaret S. Nesbit, and Jared F. Harrison, George W. Stanton, jr., J. Elliott, Blakely Wilson, and the Mississippi and Missouri Railroad Company, by Grant, their attorney, and gives this court to be informed, that on the 9th day of July, 1866, the said Mark Howard and John Weber filed their bill in equity, in the Circuit Court of the United States for the District of Iowa, alleging that they had severally recovered judgments against the city of Davenport, and the Mississippi and Missouri Railroad Company, for the sums of $4,404.10 and $10,0[illegible]2.59, for interest on certain bonds executed by the city of Davenport, to aid in the construction of the Mississippi and Missouri Railroad; which bonds were guaranteed by the Mississippi and Missouri Railroad Company, and suit was commenced against the city of Davenport, the Mississippi and Missouri Railroad Company, George W. Stanton, jr., John Elliott and Blakely Wilson, the Chicago and Rock Island, and the Chicago, Rock Island and Pacific Railroad Company; and afterwards such proceedings were had that Joseph Young, Clark Durant, Chas. W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey D. Tracy, Harriet L. Conte, Joseph Clark, Volkert P. Dow, Margaret S. Nesbit, and Jared F. Harrison, holders and claimants of cer-

tain other bonds, executed by Scott County, Muscatine city and County, Johnson County and Iowa City, which were guaranteed by said Mississippi and Missouri Railroad Company, were allowed to, and did, join with said Howard and Weber in the prosecution of said suit. And the said plaintiffs alleged in substance, that at a meeting of the stock and bondholders of the Mississippi and Missouri Railroad Company, held in New York on the 20th of October, 1865, it was resolved to sell the Mississippi and Missouri Railroad, its franchises, and all its real and personal property, to the Chicago and Rock Island Railroad Company, for the sum of five and a half millions of dollars, provided the same was distributed among the mortgage bond holders and stock holders of said Mississippi and Missouri Railroad Company, according to the following scale:

1st mortgage, Eastern divis. par & interest to 1st July, 1865,		$1,256,490
2d mortgage, "	$400,000 at 80	320,000
Oskaloosa division	665,939 at 62½	416,212
Land Grant division bonds	3,878,550 at 70	2,710,635
2d Construction mortgage bonds	693,764 at 30	208,129
Capital Stock	3,452,500 at 16	552,400
Expenses foreclosure		32,194
		$5,500,000

And George W. Stanton, jr., John Elliott, and Blakely Wilson were appointed a committee or trustees, for the stock and bondholders, to arrange the terms and manner of sale, and select some Trust Company, to receive the bonds and stock of the assenting parties, and give them certificates of what they were entitled to receive. That on the 1st of November, 1865, the said Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company, entered into a contract in writing to carry out the sale of the former company's road, according to the resolutions of the 20th of October, 1865, to the Chicago and Rock Island Railroad Company; by which agreement the Mississippi and Missouri Railroad corporation were to cause the outstanding mortgages, on its property to be foreclosed, and the said property to be sold under the foreclosure decree so as to convey a clear title to such corporation in Iowa, as the

Chicago and Rock Island Railroad Company might designate, and the five and a half millions purchase money were to be paid in bonds of said company, guaranteed by the Chicago and Rock Island Railroad Company, or a consolidated company made of the two. That the mortgages were foreclosed and a decree rendered in May, 1866, and the whole property was sold, under said decree, in separate parcels, on 9th July, 1866, to the Chicago, Rock Island and Pacific Railroad Company, for sums amounting in the aggregate to $2,100,000, and said company was consolidated with the Chicago and Rock Island Railroad, and proceeded to execute said contract of 1st November, 1865. The plaintiffs, Howard et als, claimed that the said Mississippi and Missouri Railroad Company were insolvent, and before the sum of $552,000, set apart by the terms of the sale, could be divided among the stockholders, it should be divided among them, Howard and others, as holders of the said guaranteed bonds and judgments thereon. The said Mississippi and Missouri Railroad Company, and the trustees of the stock and bondholders, who assented to said sale, Stanton, Elliott and Wilson, the Chicago and Rock Island Railroad, and the Chicago, Rock Island and Pacific Railroad, the new company created in Iowa, and consolidated with the Chicago and Rock Island Railroad, were made parties defendant. The trustees, Stanton, Elliott and Wilson, answered and made defence. The Chicago, Rock Island and Pacific Railroad Company answered, alleging that they had become agents to distribute the fund, and made no defence, and demanded to be protected by the decree of the court. Such proceedings were afterwards had, that at the May term, 1868, of the said Circuit Court, a decree was rendered, that said plaintiffs were general creditors of said Mississippi and Missouri Railroad Company, and their claims, amounting to $832,032.38, were to be paid *pro rata* out of the $532,000, which was to be divided among the assenting stockholders, and the stockholders or their agents were subrogated to the creditors' rights on the guaranteed bonds. From this decree an appeal was taken by defendants and duly prosecuted in this court at the December term, 1868, and the decree of the said Circuit

Court was affirmed; and a mandate issued from this court to the Iowa Circuit Court, commanding the said court to execute said decree so affirmed; all of which, by reference to the record and proceedings of this court in the said cause, Number 319, of the said December term, 1868, will more fully appear. And the said relators give this court further to understand and be informed, that pending said appeal to this court, and prior to the determination thereof, and the fund in controversy having been paid over to the Receiver, in said decree mentioned in pursuance of said decree, and being in his hands, as appears by his report, on file in the cause, at the October term, 1868, of said Circuit Court, one Frederic A. Foster filed his petition in said court, entitled in the said cause, claiming to be the holder of certain of the bonds of the said Mississippi and Missouri Railroad Company to the amount of $10,000 and accrued interest, being part of the bonds secured by the first mortgage on the western division of the Railroad of said company; and certain lands granted to it in aid of its construction, commonly known as "1st Mortgage Land Grant Bonds," which bonds had not assented to the said contract or agreement for the sale of the Railroad as aforesaid, and claiming to be entitled to a lien on the said fund superior to the said Howard and others, complainants, and to have the said bonds paid in full, out of said fund, in preference to said complainants. That afterwards, to-wit: at the May term, 1869, of said Circuit Court, said appeal having been determined, and the mandate from this court filed in said Circuit Court, and the complainants having moved said court to carry the decree into execution, certain other parties, to-wit: John V. McCollum, J. Bardwell and H. S. McComb, appealed for leave to file their several petitions therein; also, claiming severally, to be holders of certain unassented mortgage bonds of the said Mississippi and Missouri Railroad Company, and to be entitled to have the same paid out of the said fund, prior and paramount to any payment to the complainants, as directed by said decree. And thereupon at the said term last mentioned, an order was made by the said Circuit Court, of which a certified copy is hereunto annexed, marked "A," and made part hereof. That

thereupon at the same term, said Foster, McCollum, Bardwell and McComb prayed an appeal to this court from so much of said order as denied their petition for a suspension of the distribution of the whole of said fund, and as directed distribution of a part thereof; which appeal, together with the supersedeas thereon, of any distribution of said fund, was by the said court allowed, against the objection and remonstrance of said complainants, and said order of the May term, 1869, so far as it directs distribution to be made, remains in consequence, wholly unexecuted. That afterwards, to-wit: on the last July rule day of said Circuit Court, said Foster, McCollum, Bardwell and McComb filed their consolidated cross bill in pursuance of said order. That relators answered said cross bill, and the same was heard at the October term, 1869, and a decree made, dismissing said bill as to McCollum, adjudging that said Foster, Bardwell and McComb were entitled to share in the fund *pro rata*, on the same footing and equally with the original claimants, to wit, as general creditors of the Mississippi and Missouri Railroad Company and not otherwise, and ascertaining the amount due to them respectively, and on which dividends should be made to them, *pari passu* with the original complainants, as follows, to-wit:

To said Foster the sum of	$9,898.00
To said Bardwell the sum of	6,718.00
To said McComb the sum of	993.00

And so far modifying the original decree, as to let in said parties to participate in the benefit thereof, to said extent, and no further: A copy of said decree marked "D," is hereto annexed, and made part hereof. That said Foster, Bardwell, McCollum and McComb thereupon appealed from said decree to this court, and obtained a supersedeas thereon. That afterwards, to-wit, at the said October term, your relators moved the said Circuit Court for a rule or order on the Receiver in said cause, to proceed, notwithstanding an appeal of said Foster and others, to make distribution of the fund in his hands, under the original decree, or of so much thereof as was ordered by the court by the said order of the May Term, 1869, to be distributed, which motion was by the

said court over-ruled. That by reason of said actings and doings of said Circuit Court, subsequent to the rendition of the original decree, affirmed by this court, relators have hitherto been and are still deprived of all benefit from said decree and prevented from enforcing the same, or obtaining payment of their said claims thereunder. That said actings and doings of the Circuit Court are, as relators are advised and believe, wholly contrary to, and unwarranted by, law or equity. That relators have no remedy therefor except a writ of mandamus from this court to be directed to the Judges of said Circuit Court, commanding them to proceed to execute said decree. Wherefore they pray that such writ may issue, commanding the said judges forthwith to proceed, notwithstanding said proceedings subsequent to said original decree, to carry the same forthwith into execution, in manner and form as therein and thereby decreed; or, if the court shall be of opinion that relators are not entitled to have said decree forthwith executed, as to the whole fund in the Receiver's hands, that then the writ may issue, commanding said Judges to execute the same as to all of said fund, except so much as will be sufficient to satisfy the claims of said Foster, McCollum, Bardwell and McComb, if finally allowed in full, or commanding said judges to do whatsoever in the opinion of this court, said relators may be entitled to have done for their relief in the premises.

JAMES GRANT,
JOHN N. ROGERS,
Attorneys for Informant.

"D."

BE IT REMEMBERED, that among the records and proceedings of the Circuit Court of the United States for the District of Iowa, at the May term thereof, 1869, is the following, to wit:

MARK HOWARD
vs.
THE CITY OF DAVENPORT, ET ALS. } No. 69 EQ.

This cause coming on to be heard on motion of the complainants, to distribute a portion of the funds in the hands of

the receiver heretofore appointed in this cause, the motion of George W. McCollum, for leave to file his petition herein, the motion of Solomon Bardwell, for leave to file his petition herein, the motion of H. S. McComb for leave to file his petition herein, and the petion of Frederick S. Foster heretofore filed herein, after agument of counsel for the respective parties named, and on inspection of the record, and said several motions and petitions it is ordered adjudged and decreed.

First. That the said Gearge W.McCollum, Solomon Bardwell. and H. S. McComb, have leave to file their several petitions, and that the same be considered as filed prior to the entry of this order, and that the petitioners, the said Foster, Bardwell, McCollum and McComb, have until the July Rule day, to file a bill consolidating these claims, and setting up more specifically their several claims, presented in their several petitions now on file, but no other or further claims, and that they serve a copy of their said bill on James Grant, for the use of complainants; that complainants and intervenors, demur, plead or answer to said bill by the Rule day in August following; and that thereafter the parties proceed as in other causes in chancery.

Second. That the prayer of the petitioners above named, for an order restraining the receiver from distributing any of the fund in his hands, until their rights to share in the distribution thereof is determined, is refused and denied as to all of said fund, *except* the sum of two hundred thousand dollars.

And the motion of Complaint for an order, directing the receiver to distribute said fund is *sustained* as to all *except* said two hundred thousand dollars; and the receiver is ordered to proceed forwith to proceed to make distribution of all of said fund except the said sum of two hundred thousand dollars, according to the directions given in the decree herein to the several parties to whom said decree directs such distribution; he will sell and convert into cash as provided in said decree all of the bonds of the Chicago, Roek Island and Pacific Railroad Company in his hands, except the sum of two hundred thousand dollars.

Provided, that such of said parties to whom the distribution is to be made as they shall so elect, shall have the right to receive the amounts coming to them respectively, or any part thereof in said bonds in specie, at a price to be agreed upon between them and the receiver, and approved by the Judge of this court not less than the current market price at the Stock Exchange in New York, at date of distribution; and the Receiver shall deliver the bonds to them in payment at such rate accordingly.

And it is further ordered (the defendants Wilson and Elliott having filed there written consent thereto as provided by said cree) that there be paid to said parties entitled thereto in making such distribution (so far as said amount t o be distributed, will suffice therefor) of their claims not yet matured, as well of those already matured, on the terms and conditions and in the order of priority of payment provided by said decree.

And therefore the petitioners, Frederick A. Foster, Geo. W. McCollum, Solomon Bardwell, H. S. McComb, and each of them pray an appeal to the Supreme Court of the United States from the order and decree contained in the second paragraph, hereinbefore set out, being order denying and refusing the relief prayed in their petitions; and in the petition of each of them, that the receiver herein be directed to refrain from distributing the fund in his hands, and sustaining complainants and intevenors motion for an order distributing a portion of the fund in the hands of the receiver, directing and ordering a distribution of a part thereof; which appeals are allowed to them, and to each of them, upon their filing a bond with sureties in the penal sum of five hundred dollars, as provided by law, for the costs of the appeal. Provided, that in order to supersede and stay execution of said orders and decrees pending the appeal, they shall give bond with sureties conditioned and approved as provided by law in the penal sum of nine hundred thousand dollars.

(Signed) J. M. LOVE, *Judge.*

"A."

And afterwards to-wit, on the 2d day of June, A. D. 1869, the following was entered of record to-wit:

MARK HOWARD
vs.
THE CITY OF DAVENPORT, ET ALS.

Now comes John W. McCollum, J. Bardwell, H. S. McComb and Frederic A. Foster, petitioners in the above entitled cause, and in open court present their appeal and supersedeas bonds in compliance with the requirements and the order allowing this appeal from the decree hereinbefore entered, on the hearing of the several petitions filed herein, and move the court to approve the same; and the court having inspected said bond, as to its sufficiency in form and security orders that the said bond be filed, and is approved as to the form thereof and the sufficiency of the sureties for the penalty thereof.

(Signed) J. M. LOVE, Judge.

CIRCUIT COURT OF THE UNITED STATES.
For the District of Iowa.

I, George B. Corkhill, Clerk of the Circuit Court of the United States for the District of Iowa, do hereby certify that the foregoing is a full, true and complete copy of the decree and order of court in the case Mark Howard vs. the City of Davenport et als, as the same appears of record and now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office in Des Moines,
[L. S.] this 11th day of June, 1869.

GEORGE B. CORKHILL, *Clerk.*

Supreme Court of the United States.

DECEMBER TERM, 1869.

EX PARTE
MARK HOWARD AND OTHERS.

Motion for Mandamus, or procedendo to the Circuit Court of Iowa.

CASE.

Mark Howard and others filed their bill in equity on 9th July, 1869, in the Circuit Court of the District of Iowa, against the city of Davenport, the Mississippi and Missouri Railroad Company and others, for relief on the following state of facts:

The Mississippi and Missouri Railroad Company guaranteed the payment of certain bonds issued by the city of Davenport and other towns and counties in Iowa, to aid in construction of their Railroad. The railroad corporation issued five mortgages on its property, including a grant of land and in 1865 became embarrassed and insolvent.

In October and November of 1865, the stock and bondholders of said corporation made an agreement to sell the Mississippi and Missouri Railroad franchises and property, to the Chicago and Rock Island Railroad Company, for five and a half millions of dollars, about five millions to be paid to the assenting bondholders and a little more than half a million to be paid to the assenting stockholders.

A committee or trustees, Geo. W. Stanton, jr., John Elliott and Blakely Wilson were appointed to arrange the terms of sale. By agreements of 1st November 1865, signed by the two corporations, the trustees and assenting stock and bondholders (except $185,000 in bonds, and a few thousand shares of stock,) agreed that the mortgages on the Mississippi and

Missouri Railroad were to be foreclosed, so as to convey a good title to such company as the Chicago and Rock Island Company in Iowa might designate. The purchase money, under the agreement, was to be paid in the bonds of the new company (afterwards created and called Chicago, Rock Island and Pacific Railroad Company), consolidated with the Chicago and Rock Island Railroad Company. The mortgages were foreclosed, the property sold by decree to Chicago, Rock Island and Pacific Railroad Company for two millions one hundred thousand dollars; and the money arising from the sale under the foreclosure for the non-assenting bondholders, paid to their trustees, and the assenting stockholders were paid their scale price under the contract of sale. On the 9th July 1865, Mark Howard and others, holders of the guaranteed bonds, which were not provided for by the terms of sale of 1st November 1865, having obtained judgment v. the Mississippi and Missouri Railroad Company, filed their bill in equity in the Iowa Circuit Court, claiming that before the stockholders could be paid anything, they as general creditors, were entitled to be paid out of the fund provided for the stockholders of the Mississippi and Missouri Railroad Company. The trustees under the sale who had the control of the stockholders' fund, and were made then agents by agreement, called the Peter Myers agreement, the Chicago and Rock Island Railroad Company, and the Chicago, Rock Island and Pacific Railroad Company were made parties defendants. The bill was filed for the plaintiffs alone and not for creditors, who might join in the suit. Proceedings were had in the Iowa Circuit Court on bill, answers, replications and proofs, and at May term, 1868, a final decree was made, dividing the stockholders' fund among the plaintiffs *pro rata*, (the fund not being large enough to pay their whole claim, and subrogating the trustees and stockholders to the guaranteed bonds.) From this decree the defendants appealed, but giving no security the appeal was not a supercedeas. At the October term, 1868, Frederic Foster claiming certain mortgage bonds, the fourth mortgage on part of the road which had not assented to the terms of sale, filed his bill to arrest the execution of the decree, and the court below suspended the execution of the decree until the decision

of this court on the appeal. This court at December term, 1868, affirmed the decree of the court below in favor of Howard and others, and a mandate to execute it was filed at the May term of the Iowa Circuit Court in 1869. At that term, Foster, Bardwell, McComb and McCollum, were allowed to file a bill, claiming a lien as mortgage creditors, and also claiming as general creditors to divide the fund in court with the plaintiffs. The court ordered a distribution of all the fund, but two hundred thousand dollars, fifty thousand more than the entire claim of the plaintiffs, and Foster and others appealed from that order. At the October term, 1869, the suit of Foster and others was tried. The claim of McCollum being on bonds, which the Chicago, Rock Island and Pacific Railroad Company had bought up, as agents of the assenting bondholders and fraudulently re-issned, was dismissed. Foster, McComb and Bardwell were decreed to come in as general creditors to the amount of seventeen thousand dollars, and allowed to divide the fund *pro rata* with the plaintiffs, reducing their fund about ten thousand dollars. The court also, without any motion, petition or other proceeding, vacated the order, subrogating the agents or trustees of the stockholders to the guaranteed bonds, and ordered the Receiver to collect said guaranteed bonds and pay them into court for the creditors of the Mississippi and Missouri Railroad Company. From this decree an appeal was prayed by all of the parties, plaintiffs and defendants, except the Chicago, Rock Island and Pacific Railroad Company.

We pray, in a petition filed, setting out these facts in full, for a mandamus to compel the court below to execute the decree as affirmed by this court.

We argue:

1st. That a judgment or decree affirmed by this court cannot be altered by new pleadings or evidence in the court below, but must be executed in the exact manner in which it is affirmed.

Such is the rule in the State Courts.

"The Circuit Court, in the remanding of a cause, has but a single duty to perform—to do the specific act required, which it is not at liberty to disobey or disregard."

Ogden vs. Brown, 4 Scammon, 301.

"Where a final jndgment has been rendered in the Supreme Court, it is not open to any further proceedings in the Circuit Court."

Abrams vs. Lee, 14 Illinois, 167.

Where the decree is affirmed in all its parts, the controversy is at an end. In such case, the Circuit Court has no power to allow amendment of the pleadings or to change the decree. It can only proceed to have it enforced according to its terms and conditions."

Chickering vs. Failes, 29 Illinois, 302.

"The Appellate Court, may sometimes mistake the record, and will be liable to err in matters of law so long as men are liable to differ in opinion. But the decision in the particular case is forever the law of that case," and is conclusive, not only on these points, that appear to be noticed or directed by the opinion of the court, but on every question of law, a fact presented by the record, and which was necessary to have been decided to enable the court to arrive at such conclusion."

Briscoe vs. Tucker, 14 Arkansas, 515, 523.

A cause reversed, and mandate for judgment in conformity with reversal. "Under these circumstances it would be a most novel practice, for the Circuit Court to open the cause for new testimony, and re-try the cause. Under chancery practice, no one would have thought of re-opening the court and taking additional proofs. Otherwise the Circuit Court might go on re-hearing causes forever."

Miner vs. Medberry, 7 Wisconsin, 100, 102.

"A former decree of the Court of Appeals is conclusive and no error can be imputed to the court below, if it conforms in its subsequent proceedings to the principles of that decree. Facts, which had occurred before the first decree below, ought to have been presented before the original hearing. Parties must indicate their rights in due season."

Young vs. Frost, 1 Md. Chan. 377.

This question has been conclusively settled in this court by a series of decisions, which the court will have no disposition to reverse.

"An appeal does not lie from the refusal of a court to open a former decree, nor have the Circuit Courts power to set aside their own decrees, on motion, after the term at which they were rendered."

Cameron vs. McRoberts, 3 Wheaton, 591.
Brocket vs. Brocket, 2 Howard, 238.
McMichen vs. Perrin, 18 Howard, 507, 11.

"No principal is better settled, or of more universal application, than that no court can reverse or annul its final decrees or judgments; for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes, 3 *Wheaton*, 591, 3 *Peters*, 431, or to re-instate a cause dismissed by mistake, 12 *Wheaton* 10, from which it follows, that no change or modification can be made which may substantially vary or effect it, in any material thing. Bills of review are exceptions, which cannot affect the present motion.

When the Supreme Court have executed their power in a cause before them, and it requires further action, it sends a mandate to the court below. Whatever is before this court, and is disposed of, is considered finally settled. The inferior court is bound by the law of the case, and must carry it into execution according to the mandate. They cannot vary or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much has been remanded. 1 S. C. 194, 197. 1 H. and M. 557, 3 Mumf. 228. After a mandate, no re-hearing will be granted. It is never done in the House of Lords. 3 Dow. P. C. 157. And on a subsequent appeal nothing is brought up, but the proceedings subsequent to the mandate. 5 Cranch, 316. 7 Wheaton, 58-59. 10 Wheaton, 443."

Ex parte Sibbalds, 12 Peters, 488, 491.

And a mandamus is the proper remedy when the court below does not obey the mandate.

"Where a cause has been decided on its merits and remanded to the court below, and brought again here, it is too late to allege that the court had not jurisdiction to try the first appeal.

The Supreme Court has no power to review its decisions, whether at law or equity. A final decree is as conclusive as a judgment at law.

Wash. Bridge Co., vs. Stewart, 3 Howard, 413.

"The Superior Court of Florida had no power to grant a re-hearing, because the decree of this court made in affirmance of that below is conclusive in the inferior court. It has no authority to disturb it, by the mode proposed, but can only execute our mandate. We refer to the rules laid down in ex parte Sibbalds, 12 Peters, 489, to which nothing need be added.

Chairies vs. the United States, 3 Howard, 611-20.

"We have repeatedly decided as to judgments of this court, that they could not be changed at a subsequent term in matters of law, whether attempted on motion, or a new writ of error or appeal on the mandate of the court below."

Bank U. S. vs. Moss. 6 Howard, 31-41.

A mandamus was issued from this court to compel obedience to the mandate of this court in ex parte Dubuque and Pacific Railroad 1 Wallace, 69, and ex parte Milwaukee Railroad Company, 5 Wallace, 825.

2. We hold that no bill of review could be allowed by the court below.

"This bill of review seeks to review the decree of the court below, entered in pursuance of the mandate of this court. It is the decree of this court, and not that first entered below, that is sought to be interfered with. The better opinion is that a bill of review will not lie at all for errors of law on the face of the decree after affirmed by the Appellate Court. Nor will a bill of review lie in case of newly discovered evidence, where a decision has taken place on appeal, unless the right is reserved by the Appellate Court. This appears to be practiced in the Court of Chancery and the House of Lords in England, and we think it founded on principles essential to the proper administration of the law, and to a reasonable termination of litigation, between parties in Chancery suits. (Citing many cases.)

Southard vs. Russel, 16 Howard, 347-300.

3. The court below not only reversed the decree as affirmed, but so far as the subrogation of the trustees of the stockholders to the guaranteed bonds was concerned, without any petition or even motion for that purpose.

"Affirmative relief will not be granted a defendant in equity, unless asked by a cross bill."

McLaughlin vs. O'Rourke, 12 Iowa, 459, Do 563.

It will be argued that Foster and others were not parties to the decree and not bound by it.

We answer, that if all the necessary parties were not before the court when the case was originally heard, it was the duty of the court to require the plaintiffs to bring them in, and a failure to do so, was grounds of error in that cause.

"If plaintiff sues for self and others, it should be so stated, and if he omits it, the bill is liable to objection for want of parties, and in other cases deprive the plaintiff of the relief he seeks."

1 Dan. C. P. 364.

But this court, in affirming the decree, decided, that neither the bond holders nor stock holders were necessary parties, and they held by implication at least, that no other parties were necessary, and the plaintiffs in Howard suit, had a right to file a bill as general creditors for themselves alone, and thus gain as at law, a preference by the judgment in their favor over other creditors of the same degree, who may not have used equal diligence.

1 Daniel, 229, and cases cited.

And the following cases to the same point:

Gordon vs. Lowell, 21 Maine, 251.
Lucas vs. Arnold, 2 Stewart, 378.
Corning vs. White, 2 Page, 567.
Ogilvie vs. Knox Ins. Co. 2 Black, 539.

(No right to intervene in this cause.)

Brunson vs. R. R. Co. 2 Black, 524.
U. S. Bank vs. Burke, 4 Blackford, 145.
George vs. Williamson, 26 Missouri, 190.
Myers vs. Zanesville M. Co., 11 Ohio, 273. Same case 13 Ohio, 197.

This last case is precisely in point, being against a corpor-

ation, intended to reach its assets and a race between creditors.

The assets of this corporation are legal assets, "which, if found, could be levied upon."

Curran vs. Arkansas, 15 Howard, 304-7.

GRANT, *for the Petitioner.*

Mr. Justice Clifford

Supreme Court of the United States.

DECEMBER TERM, 1869.

EX PARTE MARK HOWARD et al.

vs.

J. M. LOVE, Judge District Court of Iowa.

Motion for an alternative Writ of Mandamus to issue against the Respondent, or rather against the Judges of the Circuit Court of the District of Iowa.

POINTS IN OPPOSITION TO THE ISSUING OF AN ALTERNATIVE WRIT.

S. W. FULLER,
B. C. COOK,
Of Counsel for GEORGE W. MCCOLLUM.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

In the Supreme Court of the United States.

EX PARTE MARK HOWARD ET AL.

vs.

J. M. LOVE, Judge District Court of Iowa.

Dec. Term 1869.

Motion for an alternative writ of mandamus to issue against the respondent, or rather against the judges of the circuit court of the district of Iowa.

POINTS IN OPPOSITION TO THE ISSUING OF AN ALTERNATIVE WRIT.

By reference to the case of the Railroad Company *vs.* Howard, 7 Wallace, 392, and on the face of the petition in this case, it will appear that the controversy relates to the distribution of a fund in the hands of the receiver appointed by the circuit court of Iowa in the original cause.

An order for the distribution of that fund among the parties *then* in court was made, and that order or decree was affirmed in this court on appeal in the case just cited.

From these references and the petition it will further appear, that Howard, Weber, and the other original complainants in these proceedings, *intervened* for the protection of their rights to the fund realized from the sale of the Mississippi and Missouri railroad after it was brought into court.

7 Wallace, 397.

While that appeal was pending in this court Foster filed a petition in the circuit court, claiming to be the owner and holder of $10,000 of bonds, which had a superior, or at least

an equal, right to share in the distribution of the fund with the claims of Howard and the others.

After the appeal was determined in this court, and the mandate filed in the circuit court, McCollum, Bardwell, and McComb filed petitions in the circuit court, also claiming superior or equal rights to the funds then in court with Howard and his associates.

(See page 4 of the petition, and McCollum's petition near the end of the record in the case now pending in this court by appeal. *The record has been filed in this court.*)

The relator's petition shows that McCollum's petition was denied; but Foster, Bardwell, and McComb were allowed in the aggregate $17,609.

It is important to keep in mind that the bonds held by these parties never were included in any agreement or stipulation to take less than their face, or, as the parties called it, "to scale them."

From this slight sketch of the history of the proceedings, and a reference to the petition itself, it will be apparent that the relators have no right to a *mandamus* directing the circuit court of Iowa to distribute the fund according to the terms of the original decree, while the claims of McCollum, Bardwell, Foster, and McComb to share in the distribution of the fund are not disposed of; because while that fund is in court all persons having claims upon it have a right to come in by petition showing their right and asking for payment out of the fund, either in full or *pro rata*, as their rights may appear.

They have the right to prefer their claims upon the fund while it is in court, and after it has been distributed to claim contributions from those who have withdrawn it from court.

This is the well-settled law and the practice of this court, and it was by the exercise of the rights thus secured to them that Howard and the other original complainants acquired their standing in court.

As to the law and practice in such cases see

Williams *vs.* Gibbs *et al.*, 17 Howard, 254, 257.
Wiswall *vs.* Simpson, 14 Howard, 52, 56.
Codwise *vs.* Gelston, 10 Johnson, 521.

If, therefore, McCollum, Foster, and their associates had a right to appear and claim to be paid out of the funds then in court their debts against the defunct and insolvent corporation, whose property had been sold to raise that fund, it could not be error for the circuit court to allow them to appear and prosecute their claims; and this court will not by *mandamus* compel the circuit court to disregard the rights of the petitioners.

On the principle of preventing circuity of action, the circuit court ought not to be compelled to distribute a fund to which parties in that court have a better right than the original claimants, and who could recover it from those claimants after they have received it under an erroneous order of the circuit court.

So that it appears upon the face of the relators' petition that, in the regular and established forms of proceeding, McCollum and his associates have presented claims to the fund in court which have been allowed in part and in part disallowed; and the presumption is that the circuit court decided rightly, until the contrary clearly appears, and a petition for a *mandamus* is not the proper way to review its action.

We do not know what cases the relators will rely upon, but the cases of *Ex parte* Railroad Company, 5 Wallace, 852; same, 1 Wallace, 69; and *Ex parte* Sibbald, 12 Peters, 488, which he may cite, are clearly distinguishable from, in that no third parties intervened in those cases; the controversies were continued by the original parties, while here third parties have appeared and been allowed to assert their rights; and this court ought not by *mandamus* to compel the circuit court to disregard their rights.

Besides, these parties have with all possible diligence brought their cases to trial, and by appeal to this court will shortly be heard here upon the merits; and this court, while those appeals are pending, ought not to compel the circuit court to part with the funds out of which the petitioners, McCollum and others, may be entitled to payment of their claims.

The authorities as to the power of this court to issue writs of *mandamus* to the circuit and district courts are collected in Brightly's Federal Digest, p. 565, sec. 18.

See especially
3 Dallas, 42.
9 Peters, 573.
4 Wallace, 522, see top page 534.

"The writ of *mandumus* is subject to the legal and equitable discretion of the court. It ought not to be issued in cases of doubtful right."
Life and Fire Insurance Company *vs.* Wilson's Heirs, 8 Peters, 291.

"According to the established practice of this court a rule of this kind is not granted as a matter of course, and the inferior court is never called upon to show cause unless a case is presented which *prima facie* requires the interposition of this court."
Ex parte Taylor, 14 Howard, p. 12.
Postmaster General *vs.* Trig., 11 Peters, 173.

Upon these authorities and conditions it seems clear that the relators are not entitled to an alternative writ, requiring the judges to show cause why they should not distribute the *whole* of the fund, according to the original decree.

The circuit court ought not to be compelled to distribute this fund as between the original parties to the suit, while new parties are appearing and show a *prima facie* right to share in that distribution as against the original parties, and when those new parties have proceeded in the manner provided by law to assert their rights, this court will not presume, until the contrary clearly appears, that the circuit court *unlawfully* declined to distribute the fund in defiance of the rights of the new claimants.

Nor should the rule be granted on the ground that all, but enough of the fund to pay these new parties, should be dis-

tributed, because other claimants may appear to claim an interest in the fund thus retained, and if their rights are equal to those of the present claimants, they would diminish the latters' chances of full payment.

This fund was derived from a sale of the property of an insolvent railroad company, and the claims of Howard and others, as well as of McCollum, Foster, and others, have been presented since the original decree was entered. It is therefore impossible to tell how many other claimants may appear whose claims, if allowed, will diminish the dividends to which McCollum, Foster, and others may appear entitled to out of the funds now in court.

There is a technical objection to the petition, because it asks for a rule to show cause why the respondent should not do one of two or more things.

The alternative writ should require the respondent to show cause why he should not be required to do a certain thing, not one thing *or* another.

"When the duty is to do either one of two things, a *mandamus* commanding the performance of one of them is bad, unless it shows on the face of it circumstances which establish the impossibility of exercising this option by performing the other."

4 House of Lords, Clark's Reports, 471.

Regina *vs.* Southeastern Railroad, 2 Selwyn's *Nisi Prius*, 1085, last London edition.

The petition for *mandamus* should present to the court a *prima facie* case of duty on the part of the defendant to perform a certain distinct, specified act, otherwise the alternative writ will not be granted.

Moses on Mandamus, 204.

We submit, also, that in order to enable this court to determine with certainty whether the circuit court ought to be required to go on and execute this decree, the full record in the second cause, that is, in the cause of McCollum, Bard-

well, and McComb, intervenors, in which a decree has been rendered and an appeal taken, because this court must either hold that no proceeding in the same cause subsequent to the original decree could vary the rights of the parties, or, upon being advised by the petitions that such subsequent proceedings have been had, the court should look into such proceedings, in order to determine their validity and effect before issuing an order which might conflict with them.

I had not seen the brief of the relators' counsel before the motion was made, and have had no opportunity to examine the authorities referred to by him, but it is sufficient to say that we do not question the principle settled by those authorities, which is, that when judgment of the circuit court has been affirmed in this court, the rights *of the parties thereto* are settled and determined, but that principle has no application in this case.

By the terms of the sale of the Mississippi and Missouri railroad certain of its creditors, secured by mortgages, were to be paid a certain sum, and then $552,400 was to be paid to the stockholders of that road. Certain other creditors of the railroad company filed their bill to reach this last fund, and a decree was made that the fund should be distributed between them, which decree was affirmed in this court. Meanwhile certain other creditors of the railroad company, who were not parties to the foregoing suit, intervened under the law of Iowa and claimed an interest in the same fund. Some of these claims were allowed in the circuit court and others rejected, and from the decision of the circuit court touching these claims two appeals have been taken to this court. The real questions of law arising from this state of facts seem to us to be these:

1. While this fund of $552,400 was in the custody of the court, could the creditors of the company lawfully intervene and have their claims satisfied *pro rata* with the claims of other creditors of equal standing?

2. Will this court by *mandamus* set aside the judgment of the circuit court in relation to these claims, determine the rights of the parties who have appeals pending in this court,

and direct the distribution of a fund from which their claims must be satisfied, if they are satisfied at all?

It is insisted that these parties are too late in their appli-tion; we respectfully submit that this court will not determine that question against the parties claiming this fund without giving them their day in court.

S. W. FULLER,
B. C. COOK,
Of counsel for George W. McCollum.

PETITION FOR MANDAMUS.

SUPREME COURT OF THE UNITED STATES.

No. 12.—ORIGINAL ACTION.

EX PARTE IN THE MATTER OF JOSIAH MORRIS AND JOHN F. JOHNSON, PETITIONERS.

PETITION FOR MANDAMUS ON HON. RICHARD BUSTEED, JUDGE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF ALABAMA.

FILED FEBRUARY 8, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 12.—Original Action.

EX PARTE IN THE MATTER OF JOSIAH MORRIS AND JOHN F. JOHNSON, PETITIONERS.

PETITION FOR MANDAMUS ON HON. RICHARD BUSTEED, JUDGE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF ALABAMA.

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1 JOSIAH MORRIS AND JOHN F. JOHNSON
vs.
UNITED STATES.

To the hon. the justices of the Supreme Court of the U. S. holding the December term, 1869:

The petition of Josiah Morris and John F. Johnson respectfully represents that at the December term of this court of 1868, to wit, on 15th April, 1869, a judgment was rendered by this court, reversing the decree made by the district court of the United States for the middle district of Alabama on the 17th Dec'r, 1866. In the said judgment of reversal it "ordered that restitution be made to the appellants of whatever sum of money they have been compelled to pay under that decree."

Your petitioners further represent that the mandate of this court on the said reversal having been duly received by said district court, a motion thereon was made in the said court that restitution be made according to the tenor and effect of said mandate.

2 But so it is, may please your honors, the district judge, not regarding his duties in this regard, has hitherto neglected and refused to carry the said mandate into effect, and still neglects and refuses so to do.

Your petitioners, therefore, that Richard Busteed, judge of the district court aforesaid, may show cause why a mandamus should not issue compelling him to perform what is required by the mandate of this court, and for such other relief as the case of your petitioners may justify.

Your petitioners file a copy of the proceedings in the said district court in verification of the statements made in this case.

P. PHILLIPS,
Sol'r for Petitioners.

8 FEB'Y, 1870.

3 (Indorsed:) Josiah Morris, John F. Johnson, vs. United States. Petition for mandamus. P. Phillips.
Filed 8th February, 1870.
(Indorsed:) Sup. Court U. S. 1869, Dec. term. Original action No. 12. Ex parte in the matter of Josiah Morris & John F. Johnson, petitioners. Petition for rule, &c.
Filed 8th February, 1870.

4 Sup. C't U. S.—Dec'r term, 1869.

JOSIAH MORRIS, JOHN F. JOHNSON—120 BALES COTTON,
vs.
UNITED STATES.

Take notice that on Friday next, or as soon thereafter as is convenient to the court, I will move for a rule to show cause why a mandamus should not issue to compel the performance of the mandate of said Supreme Court made in this cause agreeably to the prayer of the petition filed for this purpose.

P. PHILLIPS,
Sol'r Petitioners.

HON. RICHARD BUSTEED,
Dist. Judge, Middle Dist., Ala.
WASHINGTON, *Tuesday, 8th Feb'y,* 1870.
REC. 12—1

5 (Indorsed:) Josiah Morris, John F. Johnson, vs. United States. Notice of rule for mandamus. P. Phillips, sol'r.

Served a copy of within on Judge Busteed, at his room in the Metropolitan Hotel, on Tuesday, 2 p. m., 8th Feb'y, 1870.

P. PHILLIPS.

(Indorsed:) Sup. Court U. S. 1869, Dec. term. Original action No. 12. Ex parte in the matter of J. Morris and J. F. Johnson, petitioners. Service of notice.

Filed 8th February, 1870.

6 WASHINGTON, *Feb.* 10, '70.

To P. PHILLIPS, Esq., *&c., &c., &c.:*

DEAR SIR: Having been served by you with copy of notice that you would move on Friday for a rule to show cause why a mandamus should not issue to me in the case of Josiah Morris and John F. Johnson vs. United States, I have to say that I waive the issue of the rule, and at once make as my return to the same the printed pamphlet heretofore filed with the clerk, as containing in full the grounds & reasons why the mandate of the Supreme Court has not been complied with.

Respectfully yours,

RICHARD BUSTEED.

Filed 11th February, 1870.

7 *Return.*

To the honorable the justices of the Supreme Court of the United States:

The undersigned, the judge of the district courts of the United States for the State of Alabama, respectfully represents—

That heretofore, on or about the 17th day of December, A. D. 1866, in a certain cause then pending in the district court of the United States for the middle district of Alabama, between the United States, plaintiffs and libellants, and John F. Johnson and Josiah Morris, defendants, it was, by the judgment of the said court, "ordered, adjudged, and decreed that the United States have judgment of condemnation against the cotton, and judgment against the defendants, John F. Johnson and Josiah Morris, for the sum of thirty thousand dollars and costs, and that execution issue therefor." That afterwards a writ of execution was delivered to the marshal of the United States for the middle district of Alabama, requiring him to satisfy the aforesaid judgment of the property of the defendants, and that said marshal, as will more fully hereafter appear, satisfied the same out of the property of the said Josiah Morris, one of the defendants in the aforesaid action.

That afterwards, and on or about the 29th day of December, 1866, in pursuance of the eighth section of an act of Congress entitled

8 "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," approved July 17th, 1862, the said district court made an order fixing the fees and charges of its officers for their services in the aforesaid suit. That to such order was appended a direction for the distribution of the remainder of the proceeds, when collected, after deducting the allowances so as aforesaid made and the other legal charges and disbursements if any.

That the whole of this order, as it appears from the records, and which by the attorney for the United States, who drew it up, is entitled an "order of distribution," is in words and figures following, to wit:

District court of the United States for the middle district of Alabama.—November term, 1866.

U. S. AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND John F. Johnson. } Order of distribution.

In this proceeding a decree of condemnation having heretofore been rendered against 120 bales of cotton, and a judgment for the value thereof, namely, thirty thousand dollars, against Josiah Morris and John F. Johnson, and execution to be issued thereon, it is now ordered as follows:

1st. That five per cent. of the amount of said judgment, when collected, be paid over to the United States district attorney, J. Q. Smith, as a reasonable fee for his services in the prosecution of these proceedings.

2d. That one per cent. of the amount of said judgment, when collected, be paid over to the United States marshal, John Hardy, as a reasonable fee for his services rendered in these proceedings.

3d. That one per cent. of the amount of said judgment when collected, be paid over to the United States clerk, E. C. V. Blake, as a reasonable fee for his services rendered in these proceedings.

4th. That after all the costs, charges, and disbursements legally incurred herein are deducted from the amount of said judgment, one-half of the remainder to be paid over to E. R. McCrosky, who has heretofore lodged an information with the district attorney of the United States,
9 which information is to be filed in the clerk's office herewith, the other one-half to be held in the registry of the court, subject to the order of the Secretary of the United States, as provided by law.

5th. The clerk will take and file receipts under this order with the papers in these proceedings and this order.

RICHARD BUSTEED, *Judge.*

DECEMBER 29TH, 1866.

That on or about the 4th day of April, A. D. 1867, more than ten days, exclusive of Sundays, having elapsed since the rendition of the said judgment on the 17th day of December, A. D. 1866, and no writ of error, as provided by the 23d section of the judicial act of 24th December, 1789, having been served, and within that time no supersedeas or stay of execution of the said judgment having been prayed for or allowed, the said defendants, Johnson and Morris, prayed an appeal from the said decision of the said district court, in the words and figures following, to wit:

District court of the United States for the middle district of Alabama.

THE U. S. OF AMERICA
vs.
JOSIAH MORRIS, JOHN F. JOHNSON.

The above-named respondents, conceiving themselves aggrieved by the final sentence or decree entered on the 17th day of December, one

thousand eight hundred and sixty-six, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States; and they pray that this their appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the said Supreme Court.

JOSIAH MORRIS.
JOHN F. JOHNSON.

And on the same day made and executed their certain appeal bond, conditioned that the appellants should prosecute their appeal with effect, and pay all such costs and expenses as should be awarded against them.

That thereupon the said the district judge appended to the said
10 defendants' prayer for an appeal, his allowance thereof; which allowance is in words and figures following, to wit:

"The appeal prayed for in the above-entitled cause by the aforesaid Josiah Morris and John F. Johnson, is hereby allowed, sufficient security for the costs having been duly given and approved by me this 4th day of April, 1867.

"RICHARD BUSTEED,
"*Judge of the District Courts of the United States for Alabama.*"

That subsequently to the taking and allowance of the aforesaid appeal, a paper writing, signed by the district judge, was served upon the attorney for the claimants and defendants, Morris and Johnson; which said writing is in words and figures following, to wit:

"MONTGOMERY, *June* 30, 1867.

"UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOHNSON & MORRIS, CLAIMANTS.

"SAMUEL F. RICE, Esq., *Attorney for Claimants:*

"SIR: You were heretofore informed in writing by me, that the funds made upon execution in the above-entitled proceedings would be kept in the registry of the court to enable you to take the necessary steps by way of appeal to have the judgment therein reviewed. The informer, E. E. McCroskey, denied my right to make an order that postpones the receipt of that portion of the monies awarded him by statute. This is to notify you that I will hear such argument on the question as counsel on either side shall submit, to-morrow, the 4th day of June, instant, at ten o'clock a. m., at the court-room in this city.

"Yours, &c.,

"RICHARD BUSTEED, *Judge.*"

And thereupon, and after hearing argument by counsel for the informer, who also represented the attorney for the United States, and argument by counsel for the claimants, and due deliberation being
11 had thereupon, the said the district judge made an order in the words and figures following, to wit:

"UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND J. F. JOHNSON, claimants.

"A recovery having been heretofore had in favor of the United States

in the above-entitled proceedings, and execution having been issued upon the judgment therein, and the marshal for the United States, to whom the said execution was issued, having made a return that the same has been fully satisfied, and it being made to appear to the court, by the affidavit of E. E. McCroskey, the informer, and of James Q. Smith, esq., under whom, as district attorney of the United States for the middle district of Alabama, the proceedings in the above-entitled matter were instituted and conducted to a close, that the said E. E. McCroskey is the person who gave information of the facts upon which the right to recover was based, and a motion being now made for a distribution to the informer of his moiety according to the provisions of law in such case made and provided:

"Therefore, upon reading and filing the said affidavits, and hearing James Q. Smith, esq., lately district attorney of the United States, in support of the motion, and William P. Chilton, esq., opposed, and after due deliberation had thereupon—

"It is ordered, adjudged, and decreed that the said E. E. McCroskey is the informer in this matter, and that he is entitled to receive the one-half part of the recovery therein, and the clerk of this court is hereby authorized and directed to pay the said one-half unto the said E. E. McCroskey, or his legally authorized attorney, taking his receipt therefore, and filing the same.

"RICHARD BUSTEED, *Judge.*

"JUNE 4TH, 1867."

The foregoing, it is believed, is a complete presentation of the status of this case before and at the time the error book was made up for the supreme bench. The district judge is advised and believes
12 that the above order, made by him on the 4th of June, 1867, for distribution to the informer, formed no part of the record upon which the appellate tribunal was asked to pronounce its judgment. An examination of the "transcript of record" No. 163, filed in this case in the Supreme Court December 4th, 1867, and furnished the undersigned by the attorney for Morris, shows that the order of distribution of June 4th, 1867, is omitted therefrom, and the district judge directs the specific attention of the honorable the justices of the Supreme Court to the omission, supposing that if the fact was known to the Supreme Court that distribution to the informer had been ordered, some other judgment than the one it rendered might have been pronounced.

It is proper to state in this connection, that when the undersigned, the district judge, assumed the actual discharge of the duties of his office, he found it to be a very common practice for attorneys to take original papers from the files and from the custody of the clerk's office, and retain them in their own possession until it suited their convenience to return them. By this means, important records were often mislaid and sometimes lost. The undersigned, the district judge, at an early period, promulgated strict rules on the subject, which he supposed had the effect of curing the evil. In regard to the order for distribution made by him on June 4th, 1867, the fact, as the district judge believes it to be, is, that either the marshal or the district attorney retained it in his possession, and the clerk (Mr. Blake) procured it from one of them some time in the spring of 1869, and placed it on the files of the court, where it now is. No reflection, however, is intended to be cast upon the good faith or professional conduct of the persons who made up the record for the Supreme Court.

The undersigned, the said district judge, further represents that the

case on appeal was submitted to the Supreme Court at the December term, 1868, but the district judge is not advised whether argu-
13 ment was made upon behalf of the United States, or whether the case was submitted upon briefs and points, or whether it was merely submitted upon the case as made by the appellants.

The district judge presumes, however, that the Attorney General, or his assistant, did all they deemed necessary to guard and protect the interests of the appellees.

That at the May term, 1869, of the district court of the United States for the middle district of Alabama, a motion was entered upon the motion docket of that court in words and figures following, to wit:

"District court of the United States for the middle district of Alabama.—May term, 1869.

"UNITED STATES
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND John F. Johnson, claimants.

"The Supreme Court of the United States having at the December term thereof, A. D. 1868, to wit, on the 15th day of April, 1869, reversed the decree heretofore rendered by this court, and remanded the same to this court, with direction to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree:

"Now motion is made by Josiah Morris to the honorable the said district court, to be tried on the 4th Monday in May, instant, or as soon thereafter as this honorable court will hear the same, for restitution to be made in said cause to Josiah Morris of the sum of thirty-one thousand six hundred and eighty-nine 55-100 dollars, which the said Josiah Morris was compelled to pay under said decree, upon an execution in the hands of John Hardy, then United States marshal for said district, to wit, on the 26th day of March, 1867, as by his receipt, a copy of which is herewith filed, bearing said date, will more fully appear.

"And the said Josiah Morris, the party who paid the said money upon an execution on said decree as aforesaid, will at the same time move the honorable the district court to compel the persons to whom a portion of said funds were paid under the order of distribution heretofore made by this court, to the said Josiah Morris; and to that end he prays the Honorable James Q. Smith, late district attorney of the United
14 States, and John Hardy, late marshal of the United States, in said district, and E. C. V. Blake, esq., the clerk of this court, and one —— McCroskey, who, it was alleged, was an informer in said cause, be made parties to said motion, as well as the present district attorney, Francis Bugbee, esq., who represents the United States, but who received none of said moneys, and notified to appear at said time in your honor's court, and show cause why this motion should not be granted.

"May 13, 1869.

"JOSIAH MORRIS,
"By CHILTON & THORINGTON,
"*His Attorneys*"

That afterwards, to wit, on the 23d day of June, 1869, at the said May term, upon the regular call of the motion docket, the above motion came

on to be heard, and the attorneys for the motion added to the foregoing notice a clause in words and figures following, to wit:

"And will move the court that his honor take any other step in consonance with the law to execute the mandate of the Supreme Court in this cause.

"CHILTON & THORINGTON,
"*For Morris.*"

That this motion, as amended, came on to be heard on the 23d day of June, 1869, and occupied the attention of the court for two days; that the appellants, Johnson & Morris, did not apply for or issue any subpœnas for any witnesses, but that all the parties named in the notice of motion, except McCroskey, appeared in person or by attorney, and the court, on its own motion, directed Cornelius Cadle, junior, commissioned by the Comptroller of the Currency a receiver of the assetts which were of the First National Bank of Selma, to be made a party to the proceeding. Cadle was in court at the time of this direction, and appeared, as did the other parties, by attorney.

That it appeared that no notice of the motion to execute the mandate had been given to or served upon McCroskey, the informer, either by mail or publication, or otherwise, and this was stated in open court by the counsel for Morris. It also appeared that McCroskey was not
15 a resident of the State of Alabama, and it did not appear that he was within the State of Alabama, so that he might be served either with the process of subpœna or with less formal notice.

That the salient and material facts which appeared in proof, upon the oral examination of the witnesses James Q. Smith, E. C. V. Blake, and Josiah Morris, and by the written answers under oath of John Hardy, lately the marshal of the United States for the middle district of Alabama, and the same officer who executed the writ of fieri facias of James Q. Smith, lately district attorney of the United States for the said district, of E. C. V. Blake, the clerk of the district court of the United States for said district, and of Cornelius Cadle, junior, are substantially these:

1st. In the month of January or February, 1866, John Hardy, then marshal as aforesaid, received from the Department of the Interior at Washington, a circular in words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"*Washington, January* 23, 1866.

"SIR: You are hereby informed that the Secretary of the Treasury on the 19th instant notified this department that, pursuant to the authority contained in the 54th section of the act "To provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863, he had employed as depositories of public moneys, except receipts from customs, the following banks in your State, viz:

"The First National Bank of Selma.

"You are required to acknowledge the receipt of this notice.

"I am, sir, very respectfully, your obedient servant,
"W. T. OTTO,
"*Assistant Secretary of Interior.*

"JOHN HARDY, Esq.,
"*U. S. Marshal for Middle District of Alabama.*"

16 2d. A letter similar in all respects to the above letter to Hardy was received by E. C. V. Blake, the clerk of the district court.

3d. The said Hardy and the said Blake, respectively, complied with the instructions contained in the above letters of the Secretary of the Interior, and at the time of the failure of the First National Bank of Selma, which occurred some time in the spring of 1867, there was found on the books of the said bank to the credit of the United States district court for the middle district of Alabama, for moneys deposited by E. C. V. Blake, clerk, the sum of thirty-one thousand and thirty-four 60-100 dollars, and to the credit of John Hardy, U. S. marshal, the sum of forty-five thousand three hundred and fifty-five 18-100 dollars, for moneys deposited by him.

4th. At the May term, 1867, of the district court for the middle district of Alabama, such proceedings were had that, on the first day of June, A. D. 1867, by the judgment and determination of this court, the said association, known as the First National Bank of Selma, "had violated the provisions of the said act of Congress, and thereupon the court adjudged and decreed that said banking association had forfeited all its rights, privileges, and franchises derived from said act of Congress, and declared the same dissolved."

5th. That John Hardy, for the money received by him in satisfaction of the execution issued against the defendants, Johnson and Morris, gave a receipt in words and figures following, to wit:

"District court of the United States for the middle district of Alabama.

"UNITED STATES
vs.
JOSIAH MORRIS, JOHN F. JOHNSON.

"Received, Montgomery, March 25th, 1867, from Josiah Morris, the following stated sums of money, as full satisfaction of the above-stated execution, viz:

17	Judgment	$30,000 00
	Interest	653 00
Clerk's fees		23 90
Marshal's fees		35 10
Attorney's fees		30 00
Witness' fees		193 55
Marshal's commissions		754 00
		$31,689 55

"JOHN HARDY,
"*U. S. Marshal Middle District of Alabama.*"

6th. On the hearing of the aforesaid motion to carry into execution the mandate of the Supreme Court, the attorneys for the appellants put in as proof a paper showing that the appellant Josiah Morris was the only real party in interest in the recovery back of the moneys made by the marshal in satisfaction of the execution issued by the court below; this paper is in words and figures following, to wit:

"District court of the United States, middle district of Alabama.—
Pending spring term, 1869.

"I, John F. Johnson, do hereby make oath that the money collected on an execution in favor of the United States, and against Josiah Morris

and myself, issued from the district court of the United States at Montgomery, on the 14th day of January, 1867, for the sum of thirty thousand dollars, and interest from the 17th day of December, 1866, and also the sum of two hundred and eighty-two 55-100 dollars, adjudged for cost, &c., was paid by Josiah Morris to the marshal, and the said Morris is entitled to the whole of said money, if restitution is made. This defendant has paid no part of said money.

"J. F. JOHNSON.

"Sworn to and subscribed before me this 25th May, 1869.

"E. C. V. BLAKE, *Clerk*."

7th. Cornelieus Cadle, as such receiver as aforesaid, did not himself receive any of the moneys deposited by Hardy or Blake.

The only moneys he received in person were upon executions
18 issued on judgments obtained in the district court against debtors of the bank, and such moneys he paid into the treasury of the United States, "excepting a small sum, to wit, twelve hundred dollars," which he had on hand at the time he filed his answer to the motion.

8th. E. C. V. Blake, the clerk of the middle district, did not receive any part of the moneys made by the marshal upon the execution against Johnson and Morris. This appears by his sworn answer, and is conceded on all hands.

9th. James Q. Smith received from John Hardy, the marshal, five per cent. on the amount of the judgment recovered against Johnson and Morris, this being according to the order of the court of December 29, 1866, which order is hereinabove set forth. Mr. Smith was called by the attorney for Morris, and examined orally upon the motion in aid of the execution of the mandate of the Supreme Court. The district judge has not now before him the minutes of Mr. Smith's testimony, and an application to Chilton and Rice, the attorneys for Morris on the motion, to be loaned their minutes of that evidence was not successful, these gentlemen saying they were unable to find the minutes thereof kept by them. It is not material, however, that this testimony should be appended hereto. The controversy in respect of it arose upon the attempt of the appellant Morris on the motion to examine Mr. Smith as to certain alleged transactions of a business character between him and the informer, McCroskey, in relation to the moneys awarded McCroskey as informer, and paid to him by Hardy, the marshal. On objection of counsel for Mr. Smith, the district judge held that the inquiries were not pertinent to the issue then before him.

10th. John Hardy, marshal of the United States for the middle district of Alabama, received the above-mentioned sum of thirty-one thousand six hundred and eighty-nine 55-100 dollars in satisfaction of
the judgment and execution in the case of the United States of
19 America vs. Johnson & Morris, claimants of one hundred and twenty bales of cotton. The disposition made by him of this money appears in his answer to this motion in aid of the mandate filed in the district court, and this his answer is in words and figures following, to wit:

"United States district court for the middle district of Ala.

"THE UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS & J. F. Johnson, claimants.

"And for answer to said motion this defendant says that if any

money was collected from said Josiah Morris, as alleged in said motion, the same was collected as alleged, on and by virtue of an execution duly and regularly issued by the clerk of the district court of the United States for the middle district of Alabama, on a judgment duly and legally rendered by said court in said cause, of which said cause said court had competent jurisdiction.

"And this defendant further says, that afterwards, to wit, on the 29th day of December, A. D. 1866, the said court granted an order for the distribution of said money, a copy of which said order is hereto attached, marked Exhibit A, and prayed to be taken and considered as a part hereof.

"And this defendant further says, that subsequently, to wit, at the June term of said court, A. D. 1867, the said court, on motion being submitted and after argument of counsel on both sides, ordered, adjudged, and decreed that one E. E. McCroskey was the informer in said cause and entitled to compensation as such; which said order is hereto attached, marked Exhibit B, and asked to be taken as a part hereof.

"This defendant further says, that in obedience to, and in conformity with, the terms of said orders of distribution, the sum of fourteen thousand two hundred and forty-five 86-100 dollars was paid to the said E. E. Croskey, the said sum being one-half of the money collected from said Morris, after deducting the costs, charges, and disbursements legally incurred, agreeably to the terms of the order first above mentioned. That a receipt was given for said sum by said E. E. McCroskey, which will be exhibited on trial of said motion. That the sum of fifteen hundred and thirty-two 50-100 dollars was paid under said order of distribution to the Hon. Jas. Q. Smith, who was the United States district attorney in the prosecution of said cause. That no part of the fees due to the said E. C. V. Blake, clerk of said court, was paid to him, owing to his long-continued absence beyond the jurisdiction of said court, and no part of said money passed into his hands, owing to the same cause; but this defendant avers that the entire balance of said money collected from the said Morris, to wit, the sum of fifteen thousand nine hundred and eleven and 19-100 dollars, was deposited by this defendant in the First National Bank of Selma, as this defendant had authority for doing, under general orders from the proper department of the government at Washington, a copy of which said authority is hereto attached, marked Exhibit C, and prayed to be considered as a part of this answer.

"This defendant further says that a short time after said deposit was made, before any portion of said money was withdrawn from said bank by this defendant, or any one else authorized thereto, the said bank suspended payment and business, and went into liquidation, and neither this defendant nor any one else, so far as this defendant is advised, has been able to recover any portion of said fund so deposited, although this defendant and others in the interest of the government have made diligent efforts to that end.

"And this defendant says that he has not now, nor had he at the time said motion was filed, nor has he had at any time since said bank suspended and said payments were made, any portion of said funds in his hands or under his control, by reason of which fact this defendant says he is wholly incapable, in any sense, of restoring to said Morris any portion of said money.

"And this defendant further says, that although the judgment of said district court in said cause was reversed by said Supreme Court, yet this

defendant is advised and believes, and so states, that said judgment of reversal was upon a question in no way affecting the merits of said cause; but this defendant is advised and believes, and so avers, that the said money so collected from said Morris was the proceeds of the sale of certain cotton which was in fact and in law the property of the United States, and which, or the proceeds thereof, said government is justly and legally entitled to have; all of which this defendant is ready to verify; wherefore he prays judgment, &c.

"M. D. GRAHAM,
"*Attorney for John Hardy.*

21 "THE STATE OF ALABAMA, *Montgomery County:*

"Before me, George H. Patrick, U. S. commissioner for the middle district of Alabama, personally came John Hardy, the defendant in the above motion, who, being duly sworn, on oath says that the facts, allegations, and statements contained in the foregoing plea or answer, when stated of his own knowledge, are true, and when stated on information and belief, he believe them to be true.

"JOHN HARDY.

"Sworn to and subscribed before me this the 4th day of June, A. D. 1869.

"GEO. H. PATRICK,
"*U. S. Commissioner Mid. Dist. Ala.*"

It is to the foregoing state of facts that the mandate of the Supreme Court in the case of the United versus Johnson & Morris, attaches. The enjoining clause of that mandate is in these words:

"And it is further ordered that this cause be, and the same is hereby, remanded to the said district court, with directions to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree."

The undersigned, the district judge of the United States district court for the middle district of Alabama, to whom the mandate of the Supreme Court is directed, now comes to the honorable the justices of the Supreme Court, declaring that while he desires fully and faithfully, and without delay, to carry into effect the above-mentioned mandate, he finds himself embarrassed as to the means he shall use to do this. His own embarrassment has been intensified by the fact that the attorneys for the appellant Morris, and the attorneys for the parties respectively made defendants to the motion, confess their inability to frame an appropriate decree in the premises.

The brief furnished to the district judge by one of the counsel for Morris, contends, among other things, that the original decree of September 17th, 1866, was void for want of jurisdiction in the court to render it, and that both the orders of distribution are also void, and
22 constitute no valid excuse for the payments made thereunder by Hardy; and a form of decree submitted by this counsel to the district judge, after reciting that Hardy's answer shows no good or valid reason why he should not make restitution of the amount collected from Morris, and after reciting that Hardy had no authority by law, under or by virtue of the writ of fieri facias, to collect from the said Morris any amount whatever, embraces a proposition for the attachment and imprisonment of the said Hardy until such time as he pays over to the said Morris the amount collected from him upon the said execution.

The counsel for Hardy, on the other hand, contended that the subject-matter of the suit, being within the jurisdiction of the district court, all its orders and decrees and judgments were valid and binding until reversed by the superior tribunal, and until such judgment of reversal the marshal could not excuse himself from obeying its mandates and executing its process. That the process of the court, regularly issued, was not only the law to the executive officer of the court, but protected him fully from all consequences arising out of its enforcement by him, and that for the marshal, Hardy, to have disregarded, or to have failed to execute, the writ of fieri facias, according to its exigence, would have been to render himself liable to be proceeded against and punished as for a contempt.

These various positions were argued with great ability by counsel for the late marshal, and an imposing array of adjudicated cases cited in support of them. The propositions submitted upon Hardy's behalf were and are to the mind of the judge, self-convincing, and the decisions upon these points, and the plainest principles of law, it is submitted, leave no room for cavil or doubt.

The counsel for James Q. Smith, esquire, the late United States district attorney, as to the moneys received by him under the order of the court of December 29, 1866, relied upon the same grounds and adjudi-
cations taken and cited by the counsel for the late marshal, and no
23 order was sought to be taken against either Cadle, the receiver of the National Bank at Selma, or Blake, the clerk of the district court for the middle district of Alabama.

Referring to the language of the injunction contained in the mandate of the honorable the Supreme Court, it will be seen that the district judge is required "to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree:" meaning by "that decree," the judgment of condemnation pronounced by the district court upon the law and the facts in the case of the United States of America against Josiah Morris and John F. Johnson.

And right here the question obviously occurs, who shall make restitution, and of whom has the district court jurisdiction to enable it, as against them, to enforce its orders. The answer to this inquiry is close at hand. The court has such jurisdiction over parties and privies to the particular action in respect of which its powers are sought. The parties to this action are the United States of America, as plaintiffs, against one hundred and twenty bales of cotton, and Johnson and Morris, as claimants thereof.

After information filed, certain exceptive allegations were entered against the information. These were overruled by the judgment of the court, and a trial had on the merits, without the intervention of a jury, the judge being of the opinion that the 7th section of the act of Congress, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17th, 1862, which required proceedings for the condemnation of rebel property to "conform as nearly as may be to proceedings in admiralty or revenue cases," imposed upon the court itself the duty of trying the cause. This opinion and ruling the honorable the justices of the Supreme Court will remember was before the
decison of the case of the "Union Insurance Company versus the
24 United States," or the case of "Armstrong's Foundry," and it may not be inappropriate to remark that in both of these cases the condemnation sought was of real estate, and an actual seizure of

the thing itself was of course always possible, while in the case of Morris and Johnson, condemnation of specific personal property was prayed for. And in this connection it is proper, in view of the statement in the opinion of the Supreme Court reversing the decree of the district court, that "the information at most presents only a case of the unlawful conversion of property, and that for redress of such an injury this proceeding by information cannot be sustained," that the district judge should state, in justice to James Q. Smith, esquire, the late district attorney, that before the information in this case was filed by him he brought an action of trover in the district court for the middle district, and sought in it to recover the value of these same one hundred and twenty bales of cotton.

That objection was taken by the attorney of Morris and Johnson, and it was contended that trover would not lie for personal property in the custody of the law, nor in a case where the title to the property could only be settled by a peculiar jurisdiction, and that the United States not having had either a general or special property in the cotton, and never having had actual possession of it, and their right to its immediate possession being dependant upon the result of a suit, they could not maintain an action for its unlawful conversion. The district judge was of opinion that these objections to the form of the action were well taken, and allowed Mr. Smith, the district attorney, to withdraw a juror, and instructed him to file a libel of information against the cotton under the acts of Congress approved August 6th, 1861, and July 17th, 1862, which was accordingly done, and which is the same libel of information set out in the transcript of record in the case now under consideration.

The undersigned, the district judge, further respectfully suggests to the honorable the justices of the Supreme Court of the United States, that, following out what he understands to be the doctrine of the case of the Bank of the United States against the Bank of Washington, reported in 6th Peters, he might feel himself obliged in the execution of the mandate in the present case, unless otherwise instructed, to require the United States to make restitution to the appellant Morris of the moneys which he was compelled to pay them under a judgment in their favor regularly obtained, and an execution thereon, regularly issued, in the hands of their marshal, leaving the United States their right of recourse, if any, against the marshal, the district attorney, the receiver of the bank, and the informer, McCroskey.

This, it appears to the undersigned, would be according to the literal language of the mandate, but he is not clear that it would be according to its spirit or intention.

Besides, in the opinion of the district judge, such an order should not go against the United States, because, on the question of title to these 120 bales of cotton they have a judgment in their favor, based upon the clearest evidence, and because one-half of the sum recovered has actually been paid over to the ascertained informer, and other parts of it paid to officers of the court, under the direction of the law, and because also of the belief of the undersigned, that the Supreme Court was not made acquainted with the fact of the payment to the informer of his moiety.

Now, therefore, in consideration of the premises, and in reliance upon the wisdom and justice of the honorable the Supreme Court, the undersigned submits this return for the consideration of the judges, and craving their indulgence if it shall be deemed irregular, most respectfully asks that they prepare for his instruction, and send to be executed by him, such an order in the premises as will satisfy and fill the

requirements of the mandate of the Supreme Court upon this behalf.

Montgomery, Ala., December 20, 1869.

RICHARD BUSTEED,
Judge of the District Courts of the United States, for the State of Alabama.

Attest: A true copy.
[SEAL.]

E. C. V. BLAKE, *Clerk.*

Filed 11th February, 1870.